TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 37

LIBBY, McNEILL & LIBBY, A CORPORATION,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MARCH 28, 1950.

CERTIORARI GRANTED JUNE 5, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~ 1950

No. ~~710~~ 137

LIBBY, McNEILL & LIBBY, A CORPORATION,
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THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 46984

LIBBY, McNEILL & LIBBY, a corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed April 26, 1946

To the Honorable the Chief Justice and Associate Judges of the Court of Claims:

Libby, McNeill & Libby, a corporation, for cause of action against the United States of America, respectfully shows:

[fol. 2] 1. Plaintiff Libby, McNeill & Libby, is now and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Maine.

2. This action is brought pursuant to § 145 of the Judicial Code (28 U. S. C. A. § 250) against the United States of America, a corporation sovereign, as defendant.

3. Plaintiff is now and at all times herein mentioned was the true and lawful sole owner of the full powered American steam vessel *David W. Branch*, Official No. 214368, of 5,544 gross and 3,435 net register tonnage and having the following register dimensions: length 280.6 feet, breadth 48.7 feet, and depth 24.7 feet.

4. On September 15, 1941, plaintiff and defendant (represented by the Assistant Superintendent, Army Transport Service, Seattle, Washington, he being thereunto duly authorized) voluntarily entered into a written charter party agreement providing for the chartering of said vessel by plaintiff to defendant on a bareboat basis, a true copy of said charter party is hereto attached as Exhibit "A" and made a part hereof. Pursuant to said charter party, said vessel was delivered by plaintiff and accepted by defendant at the Port of Seattle, Washington, on September 15, 1941.

5. Following said delivery and acceptance and continuing thereafter until the termination of said charter party on

July 14, 1942, said vessel was in the exclusive possession [fol. 3] and control of defendant, as charterer. During said period defendant, at its own expense and procurement (acting through the Army Transport Service of the War Department) officered, manned, operated, victualed, fueled and supplied the same, and paid all other costs and expenses incident to such operation.

6. Following said delivery and acceptance and prior to the voyage hereinafter mentioned defendant fitted out said vessel for the transportation of combat troops and military personnel and for the carriage of military cargoes and munitions of war, and renamed or commissioned said vessel for its use and service as the United States Army Transport *David W. Branch* (*USAT David W. Branch*). Said vessel was equipped and provided with protective and offensive armament and the necessary gun crews to man the same, and was subjected to a process known as "deperming" as a protection against destruction or damage by magnetic mines, and defendant otherwise manned, equipped and supplied said vessel for use and operation as a United States Army Transport and thereafter and at all times herein mentioned defendant employed, used and operated said vessel exclusively as such.

7. On December 7, 1941, defendant was attacked by the military forces of the Empire of Japan and thereupon the Congress of the United States duly declared a state of war to be existing between defendant and the Empire of Japan, and shortly thereafter a state of war was duly de- [fol. 4] clared to exist between defendant and other Axis Powers, including the German Third Reich and the Kingdom of Italy. At all times hereinafter mentioned defendant was engaged in the vigorous prosecution of said wars and the defense of her people, lands and territories, including the Territory of Alaska. In furtherance thereof defendant employed and operated said vessel as a public vessel of the United States in the carriage of defendant's military personnel, officers and troops of the armed forces, military supplies and munitions of war between the Port of Seattle, a principal base of war operations in the United States, and various ports and places in the Territory of Alaska, including those hereinafter mentioned, at and from which war operations were being conducted by defendant.

8. In the prosecution of the wars then existing and on or about January 11, 1942, said vessel fully laden solely with defendant's military personnel, civilian employees of the War Department, officers and troops of the armed forces and defendant's military supplies and munitions of war, as follows: ammunition and guns; troop impedimenta; Army motor trucks, trailers, tractors and "jeeps;" explosives; "K-D" houses for housing of military personnel; Army Signal Corps equipment; diesel oil; military construction machinery and equipment; troop clothing, food, rations and supplies; and other military supplies and munitions of war wholly owned by defendant, the exact description and nature of which is presently unknown to plaintiff, [fol. 5] departed from the United States Army Port of Embarkation in the Port of Seattle, bound on a voyage to the following bases of war operations and areas of war activities in the Territory of Alaska, to-wit, Yakutat, Dutch Harbor, Seward and Umnak Island. At and prior to the time of said vessel's departure on said voyage and at all times during said voyage, and at the time of said vessel's stranding on Hanmer Island, in the waters of British Columbia, on January 13, 1942, as hereinafter more particularly described, said vessel was not engaged in the transportation of passengers or cargo for hire nor was said vessel employed in any manner by defendant as a merchant vessel, but said vessel was employed exclusively as a public vessel of the United States. At all times during said voyage and at the time of said stranding, said vessel was engaged in a warlike operation in prosecution of the state of war and open hostilities then existing between defendant and the Axis Powers, including the Empire of Japan.

9. On such a voyage from the Port of Seattle to Yakutat, Territory of Alaska (the first port of call), the customary, most expeditious, safest and usual peacetime route for vessels of the size of said vessel was by way of the Strait of Juan de Fuca thence directly to Yakutat in the Gulf of Alaska on generally northwesterly courses over the open Pacific Ocean, keeping to the westward of Vancouver Island, Queen Charlotte Islands, Baranof Island and the other islands of Southeastern Alaska. Defendant knowing that if said usual and customary route from the Port of Seattle to [fol. 6] Yakutat known as the "outside route" had been pursued by said vessel on said voyage, said vessel, her pas-

sengers and cargo, would have been thereby openly exposed to hostile enemy action then imminent, and defendant fearing such action and the consequences thereof, directed and ordered said vessel to proceed on said voyage by way of the narrow, tortuous and dangerous "inside passage" to Yakutat, thus requiring said vessel to proceed to the eastward of Vancouver Island, thence through the narrow and tortuous channels between and among the islands of British Columbia and Southeastern Alaska in which must be encountered swift and unpredictable currents as well as submerged rocks and reefs, all of which constituted great hazards to the safe navigation of said vessel.

10. In obedience to defendant's orders and directions said vessel proceeded on its said voyage by way of said "inside passage" and while so proceeding at her maximum full ahead speed of fourteen knots per hour, and being required to steer a dangerous course taking said vessel within three hundreds yards of Hanmer Island, in order to navigate the swift waters and strong currents of the narrow channel between Hanmer Island and Elliott Island at the southerly end of Melacca Passage, British Columbia, said vessel, at approximately 10:46 P. M., January 13, 1942, violently stranded and grounded on a partially submerged reef adjacent to and forming a part of said Hanmer Island.

11. The above described stranding of said vessel was not willful nor occasioned by latent defects of or in said vessel, [fol. 7] but said stranding and the damages resulting therefrom were caused by and were consequence of—

(*a*) the warlike operation upon which said vessel was then engaged;

(*b*) the execution or carrying out of the warlike operation upon which said vessel was then engaged;

(*c*) the orders and directions of defendant requiring said vessel to proceed from the Port of Seattle to Yakutat, and in said vessel's so proceeding (as a consequence of hostilities and in the course of and in executing the warlike operation) by way of the navigationaly hazardous "inside passage," to avoid hostile enemy action then feared and imminent, to which said vessel, her passengers and cargo would have been exposed had said vessel been permitted by

defendant to proceed from the Port of Seattle to Yakutat by the usual and customary peacetime "outside route"; and

(*d*) the negligence and inattention to duty of the officers and crew of said vessel in carrying out said warlike operation.

12. As a direct consequence of said stranding said vessel suffered severe damage to her hull, machinery and appurtenances and in order to release said vessel from her strand it became necessary to jettison a portion of her cargo and to transfer the remainder thereof to other vessels for immediate carriage to destination, and to otherwise undertake and carry out extensive salvage operations. After being released from her strand said vessel was returned to the Port [fol. 8] of Seattle, where repairs to her hull, machinery and appurtenances were promptly carried out and satisfactorily completed at 12:00 noon April 13, 1942, through the joint and combined efforts of plaintiff and defendant. Plaintiff, as owner of said vessel, without prejudice to the question of ultimate liability therefor under said charter party, was requested to and did incur and expend, in connection with the repairs to said vesel and said salvage operations, including general average and on account of risks and liabilities assumed by defendant under said charter party, as more particularly hereinafter set forth, the reasonable and agreed sum of $376,035.57, on account of which defendant has paid the sum of $26,954.49, leaving a balance of $349,081.08.

13. Said charter party provides in part as follows:

"(13) (Insurance) (a) Owner shall at its own expense assume the usual American Time Hulls form of insurance for Owner's and Charterer's account, giving Charterer the benefit of such insurance.

"(b) Charterer shall assume all other risks, including war risk (whether or not there shall be a declaration of war).

"(d) * * * in the event loss or damage shall occur from a risk assumed by Charterer, Charterer shall pay Owner for all such loss or damage suffered by Owner and indemnify Owner against all claims and demands arising out of such loss or damage."

[fol. 9] Upon the execution of said charter party and in compliance therewith, plaintiff, at its own expense, procured

a policy of marine risk insurance on the usual American Time Hulls form of insurance for "Owner's and Charterer's account" and in amount and on a form satisfactory to and approved by defendant, and upon which defendant in addition paid the premiums for extended trading limits as required by section (13)(c) of said charter party.

14. Said policy of marine risk insurance contained the usual "F. C. & S. Clause" as follows:

> "Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from the capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the vessel, by requisition or otherwise, whether in time of peace or war, and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom."

The stranding of said vessel and all damage and expense resulting therefrom were the consequences of hostilities or warlike operations upon which defendant and said vessel were then engaged, and were not caused directly or indirectly by any risk assumed by plaintiff under said charter party, but resulted from risks enumerated in the "F. C. & S. [fol. 10] Clause" contained in said policy of insurance and therefore excluded from coverage thereunder, all of which risks so excluded were assumed by defendant under said charter party. The defendant is obligated under the provisions of said charter party to pay to plaintiff the balance of the sum incurred and expended by plaintiff as set forth in paragraph 12 hereof. The risks assumed by defendant under said charter party were not covered by any policies of insurance or other evidence of insurance, issued by defendant or any of its agencies pursuant to the Merchant Marine Act, 1936, Title II, as supplemented and amended (Title 46 U. S. C. A. §§ 1128 (a) to 1128 (g) inclusive), or otherwise.

15. Said charter party further provides:

> "(6) (Hire) (a) The Government shall pay to the Owner the sum of $3.50 per deadweight ton for the use

of the vessel, payments to be made monthly as earned, commencing on and from the day and hour of delivery, * * * hire to continue until the day and hour when the vessel is redelivered to the Owner except: * * * (3) if the vessel is damaged or injured under any of the risks herein assumed by the Government, to the extent that she is no longer fit for the Government service, the Government may, for the purpose of computing hire, but for no other purpose, declare the vessel constructively lost by giving written notice to the Owner or its representative, in which event hire shall cease and this Charter Party shall terminate; * * *."

[fol. 11] The stranding and resulting damage to said vessel occurred as a consequence of and under risks assumed by defendant, and said vessel was not damaged to the extent that she was no longer fit for defendant's service. The defendant did not for the purpose of computing hire or otherwise, declare said vessel constructively lost, by giving writtent notice to plaintiff or its representative, or otherwise. Despite demand therefor defendant has failed and refused to pay plaintiff the charter hire provided in said charter party, for the period beginning at 10:46 P. M. January 13, 1942, and continuing to 12:00 noon April 13, 1942, said unpaid charter hire for said period being the sum of $60,085.57.

16. Plaintiff has at all times faithfully and fully performed and carried out all obligations, matters and things required by or provided in said charter party to be performed and carried out by plaintiff as the owner of said vessel.

17. By reason of the matters and things herein alleged, defendant is indebted to plaintiff in the total sum of $409,166.65. Plaintiff has presented its claim for payment of the above sum to defendant. No action on said claim has been taken by Congress or by any department of the Government.

18. Plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government. Plaintiff is the owner of said claim and no assignment or transfer of said claim or [fol. 12] any part thereof or interest therein has been made.

Plaintiff is justly entitled to recover the amount claimed after allowing all just credits and offsets. Plaintiff believes the facts as stated herein to be true.

Wherefore plaintiff prays judgment against defendant in the sum of $409,166.65, together with costs and interest to the extent allowable by law, and for such other and further relief as may to this Honorable Court seem just and proper.

Dated: Seattle, Washington, April 19th, 1946.

Libby, McNeill & Libby, a corporation, By Guy V. Graham, Manager (Salmon Division), Attorney in Fact, Plaintiff.

Bogle, Bogle & Gates, Attorneys for Plaintiff, Office and Post Office Address: 603-24 Central Building, Seattle 4, Washington; Edward G. Dobrin, Stanley B. Long, Of Counsel, Office and Post Office Address, 603-24 Central Building, Seattle 4, Washington.

[fol. 13] *Duly sworn to by Guy V. Graham. Jurat omitted in printing.*

[fol. 14] EXHIBIT A TO PETITION

This Charter Party made and concluded in the City of Seattle, Washington, on the 15th day of September, 1941, between Libby, McNeill & Libby, Owner of the good American vessel David W. Branch, with proper certificate for hull and machinery and classed American Bureau of about 5725 tons deadweight or thereabouts on Summer free board, inclusive of bunkers and stores, and The United States of America (represented by the Assistant Superintendent, Army Transport Service, Seattle, Washington), Charterer

Witnesseth:

(1) (Port, time and condition of detail) (a) The vessel shall be delivered to the Government at the Port of Seattle in such dock or at such wharf or place immediately available as the Government may direct.

(b) Delivery of the vessel not to be made before the 15th day of September, 1941, nor after the 16th day of September, 1941, subject however to the terms and con-

ditions as set forth in Paragraph 1(e) of this Charter Party.

(c) The vessel shall on delivery be tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted and equipped, and in every respect seaworthy and in good running order and condition and repair, fit for the service in which she has usually been employed and with hulls and liquid cargo tanks clear and clean, ready to receive cargo (with pipe lines, pumps and heater coils, if any, in good working condition) so far as the exercise [fol. 15] of due diligence can make her. On delivery the vessel shall have Bureau of Marine Inspection and other required United States Unexpired Navigational certificates indicating that she has met all requirements to fit her for the trade in which she was employed at the time of the execution of the Charter Party. Any deficiencies in these respects will be remedied forthwith at the expense of Owners, and any time lost in remedying such deficiencies shall not be paid for by the Charterer.

(d) If Charterer accepts the said vessel, Charterer shall not thereafter be entitled to make or assert any claim against Owner on account of any representations or warranties, expressed or implied, in respect to the condition of said vessel, but Owner shall be responsible for repairs or removals occasioned by latent defects in the said vessel, its machinery or appurtenances existing at the time of delivery under this Charter Party.

(e) In the event that the vessel hereinabove described does not substantially conform to said description or, in the event that said vessel is not delivered at the time or at the port of delivery, or is not fit for service as hereinabove represented, the Government may elect to cancel this Charter or effect, with the consent of the Owner, such repairs as may be required to fit her for such service and charge the cost thereof to the account of the Owner, and hire shall not commence until such repairs are completed.

(2) (Surveys) The vessel shall be surveyed at the time of delivery and at the time of redelivery to determine the condition of the vessel and her equipment under the terms of the Charter, and in each instance the Owner and Charterer shall pay its own cost of making such survey.

[fol. 16] (3) (Cargo) Charterer may carry passengers and or lawful cargo, excluding sulphur, asphalt in bulk, petroleum products in bulk, with the exception of Diesel oil and bunker oil in ship's tanks.

(4) (Cost of Operation) The Government shall, at its own expense, man, operate, victual, fuel, and supply the vessel and pay all port charges, pilotages, and all other costs and expenses incident to the use and operation of the vessel.

(5) (Maintenance) The Government shall, at its own expense, keep the vessel in good running order and condition, and in substantially the same condition as when received, ordinary wear and tear and latent defects excepted, and have her regularly overhauled, repaired, drydocked, cleaned, and painted as necessary.

(6) (Hire) (a) The Government shall pay to the Owner the sum of $3.50 per deadweight ton for the use of the vessel, payments to be made monthly as earned, commencing on and from the day and hour of delivery, subject, however, to the provisions of subparagraph (13) (c), hire to continue until the day and hour when the vessel is redelivered to the Owner except: (1) if the vessel is actually lost, hire shall be paid up to and including the time of loss or the time last seen or otherwise known to have been afloat; or (2) in the event of loss of time caused by damage to or by the said vessel under any of the risks herein assumed by the Owner, or in making any repairs or replacements for which Owner is liable, preventing the working of the vessel for more than forty-eight (48) consecutive hours, hire shall cease for the time thereby lost; or (3) if the vessel is damaged or injured under any of the risks [fol. 17] herein assumed by the Government, to the extent that she is no longer fit for the Government service, the Government may, for the purpose of computing hire, but for no other purpose, declare the vessel constructively lost by giving written notice to the Owner or its representative, in which event hire shall cease and this Charter Party shall terminate; provided, however, that such notice shall not relieve the Government from its obligation to repair all such damages and injuries to the vessel and return said vessel to the Owner in as good condition as it was when delivered, reasonable wear and tear excepted;

and provided further, that hire shall cease only during the period necessary for actually repairing the vessel and returning same to Owner, and shall be payable for all other time until redelivery to the Owner is made as provided herein.

(7) (Fuel and Stores) The Government shall accept and pay for all fuels and consumable stores (except perishables) in good order and condition left on board at the time of delivery, and the Owner shall accept and pay for all fuel and consumable stores (except perishables) in good order and condition, left on board at the time or redelivery, payments to be made at the current market prices in effect at the port and at the time of delivery or redelivery.

(8) (Use of Equipment) The Government shall have the use of all outfit, equipment, appliances, furnishings, and utensils now on board the vessel without extra cost, provided the same or their substantial equivalent, shall be returned to the Owner on redelivery in the same order and condition as when received, ordinary wear and tear excepted.

(9) (Inventories) a complete inventory of the vessel's [fol. 18] entire equipment, outfit, appliances, and all consumable stores shall be taken and mutually agreed upon at the time of delivery, and a similar inventory shall be taken and mutually agreed upon at the time of redelivery.

(10) (Structural Changes) (a) The Government shall make no structural changes in the vessel without first obtaining the consent of the Owner.

(b) The Government may make such alterations in the vessel as its need may require, provided that the said vessel shall, at the cost of the Charterer, be restored to Owner at the expiration of the Charter Party in the same or as good condition as that in which she was when delivered to the Charterer, ordinary wear and tear excepted.

(11) (Repairs and Breakdowns) (a) All repairs required by breakdown due to latent defects in the vessel's hull, machinery, boilers, and engines, shall be paid for by the Owner, but the Owner shall not be liable for any consequental damages to the Government resulting therefrom.

(b) The Government may, if it so elects, effect such repairs as may become necessary and for which the Gov-

ernment is not financially responsible, and charge the cost thereof to the account of the Owner. Due and timely notice of the necessity for repairs shall, prior to effecting same, be given the Owner, or its representative, provided same is not inconsistent with the circumstances or the exigencies of the Government service.

(12) (Liens) (a) Neither the Government nor the Master of said vessel shall have any right, power or authority [fol. 19] to create, incur or permit to be imposed upon the said vessel any liens whatsoever.

(b) The Government agrees to fasten on the vessel in a conspicuous place in its wheelhouse and to maintain during the life of this Charter, a notice reading substantially as follows:

> "This vessel is the property of Libby, McNeill & Libby. It is under Charter to The United States of America and, under the terms of this Charter, neither the Charterer nor the Master has any right and/or authority to create or incur any liens whatsoever upon the vessel."

(c) The Government, at the termination of this Charter Party, shall redeliver said vessel to Owner free from any kind and all liens or charges incurred by Charterer during the life of the Charter Party.

(13) (Insurance) (a) Owner shall at its own expense assume the usual American Time Hulls form of insurance for Owner's and Charterer's account, giving Charterer the benefit of such insurance. Owner and/or Insurer shall have no right of recovery or subrogation against Charterer on account of loss or damage covered by such insurance, nor shall Owner assert any claim against Charterer for loss of or damage to vessel in the event solely of a deficiency in the amount of such insurance.

(b) Charterer shall assume all other risks, including war risk (whether or not there shall be a declaration of war). The Charterer does hereby agree to indemnify and hold harmless the Owner and said vessel of and from any and all claims for loss of life, personal injury and illness, including [fol. 20] maintenance and cure to seamen, which may be asserted, claimed, or recovered against said vessel or against

the Owner while said vessel is being operated by the Charterer or in connection with or as the result of such operation.

(c) It is understood by the Government that the present policies of Hull Insurance on said vessel contain trading warranties providing that the said vessel shall be operated only in the Western Hemisphere, not north of Eastport, Maine, nor south of Bahia Blanca on the Atlantic, nor north of Vancouver Island, or south of Valparaiso on the Pacific, but including the Panama Canal and the Hawaiian Islands. Should the Government operate said vessel beyond said trading limits, the Government shall notify Owner in sufficient time to enable Owner to obtain extension of said trading warranty from its Underwriters and the Government shall reimburse Owner for any additional insurance premium incurred by Owner to obtain such extension.

(d) In the event that any act or negligence of Charterer shall vitiate any of said insurance, or in the event loss or damage shall occur from a risk assumed by Charterer, Charterer shall pay Owner for all such loss or damage suffered by Owner and indemnify Owner against all claims and demands arising out of such loss or damage.

(14) (Redelivery) The vessel shall, at the expiration of this Charter Party, be redelivered to the Owner or its representative at the port of Seattle, in such dock, or at such wharf or place immediately available, as the Government may decide, in the same or as good condition as when received by the Government, ordinary wear and tear and latent defects excepted, always afloat.

[fol. 21] (15) (Salvage) All derelicts and salvage shall be for the benefit of Charterer.

(16) (Charter Effective Date and Extension) This Charter Party shall be and remain in effect from the date and hour of delivery and shall be terminated at the hour of redelivery on the 15th day of April, 1942, or upon completion of a voyage upon which vessel may be then engaged, but in no event shall said vessel be redelivered later than May 1, 1942.

(17) (Improvement) The Government reserves the right to remove from or leave in the vessel any equipment, outfit, appliances, appurtenances, and/or uttensils and other betterment furnished and/or installed by the Government, pro-

vided the vessel is redelivered in substantially the same or better condition as it was when received from the Owner, ordinary wear and tear excepted.

(18) (Plans) The Owner shall deliver to the Government promptly after the execution of this Charter Party all of the plans of the vessel which are in possession of, available to, or procurable by the Owner.

(19) (Payment Office) Payment of hire will be made by the Finance Officer, located at Seattle, Washington.

(20) (Position reports) Charterer, immediately upon receipt of such information, shall keep Owner informed, if not inconsistent with the public good, of the arrival and departure of the vessel at and from any ports of call, and of the next intended port of call. At the end of the voyage Charterer shall supply deck and engine room logs of the [fol. 22] voyage if required by owner.

(21) (Officials Not to Benefit) No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this Charter Party or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this Charter Party if made with a corporation for its general benefit.

(22) (Covenant Against Contingent Fees) The Owner warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fee. The warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

(23) (Deleted.)

(24) (Alterations) The following changes were made in this Charter Party before it was signed by the parties hereto:

[fols. 23-24] In witness whereof, the parties hereto have caused this Charter Party to be executed the day and year first above written.

Libby, McNeill & Libby, a Corporation, by F. Svensson, Manager, Salmon Division, Attorney in Fact, Owner.

Witnesses: G. V. Graham, Stanley B. Long.

The United States of America, by C. O. Thrasher, Lt. Col., Q. M. C., Assistant Superintendent Army Transport Service, Charterer.

[fols. 25-26] General Traverse—Filed June 5, 1946

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S.) John F. Sonnett, Assistant Attorney General.

Argument and Submission of Case

On November 11, 1949, the case was argued and submitted on merits by Mr. Stanley B. Long for plaintiff, and by Mr. J. Frank Staley for defendant.

[fol. 27] **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Madden, J. Concurring Opinion by Whitaker, J.**—Filed January 3, 1950

Mr. Stanley B. Long for the plaintiff. Mr. Thomas L. Morrow and Bogle, Bogle & Gates were on the briefs.

Mr. J. Frank Staley, with whom was Mr. Assistant Attorney General H. G. Morison, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special Findings of Fact

1. Plaintiff is and at all times herein material has been a corporation duly organized and existing under and by virtue of the laws of the State of Maine.

2. At all times herein material plaintiff was the true and lawful sole owner of the full powered American steam passenger vessel *David W. Branch,* recommissioned *U. S. A. T. David W. Branch,* and hereinafter called "the *Branch,*" Official No. 214368, of 5,544 gross and 3,435 net registered tonnage and having the following registered dimensions: length, 380.6 feet; breadth, 48.7 feet; depth, 24.7 feet.

3. On September 15, 1941, plaintiff and defendant, the latter being represented by the Assistant Superintendent, Army Transport Service, who was duly authorized so to do, entered into a written charter party for the chartering of the vessel by plaintiff to defendant on a bareboat basis, a true copy of which charter party is in evidence herein as [fol. 28] Plaintiff's Exhibit No. 1 and is made a part of these findings by reference. The Army Transport Service is an element of the Quartermaster Corps of the United States Army, responsible for the operation of vessels required to supply and to transfer military and civilian personnel to and from Army posts and garrisons.

Pursuant to the charter party, the vessel was delivered by plaintiff and accepted by defendant at the port of Seattle, Washington, on September 15, 1941. Following such delivery and acceptance and continuing thereafter until the termination of the charter party, the vessel was in the possession and control of the defendant as charterer pursuant to the terms of the charter party. During that period, defendant officered, manned, victualed, operated, fueled, and supplied the vessel and paid the costs and expenses thereof, except that policies for certain marine insurance, as hereinafter stated, were secured and paid for by plaintiff.

4. The charter party reads in part:

> (13) (Insurance) (a) Owner shall at its own expense assume the usual American Time Hulls form of insurance for Owner's and Charterer's account, giving Charterer the benefit of such insurance. Owner and/or Insurer shall have no right of recovery or subrogation

against Charterer on account of loss or damage covered by such insurance, nor shall Owner assert any claim against Charterer for loss of or damage to vessel in the event solely of a deficiency in the amount of such insurance.

(b) Charterer shall assume all other risks, including war risk (whether or not there shall be a declaration of war) * * *

* * * * * * *

(c) It is understood by the Government that the present policies of Hull Insurance on said vessel contain trading warranties providing that the said vessel shall be operated only in the Western Hemisphere, not north of Eastport, Maine, nor south of Bahia Blanca on the Atlantic, nor north of Vancouver Island, or south of Valparaiso on the Pacific, but including the Panama Canal and the Hawaiian Islands. Should the Government operate said vessel beyond said trading limits, the Government shall notify Owner in sufficient time to enable Owner to obtain extension of said trading warranty from its Underwriters and the Government shall [fol. 29] reimburse Owner for any additional insurance premiums incurred by Owner to obtain such extension.

(d) In the event that any act or negligence of Charterer shall vitiate any of said insurance, or in the event loss or damage shall occur from a risk assumed by Charterer, Charterer shall pay Owner for all such loss or damage suffered by Owner and indemnify Owner against all claims and demands arising out of such loss or damage.

5. In compliance with the terms of the charter party, plaintiff at its own expense procured policies of marine insurance on the usual American Time Hulls form of insurance for "Owner's and Charterer's account" in amounts and on forms of policies approved by defendant, which policies carried riders recognizing the charter arrangements between the plaintiff and defendant and covered the interests of the defendant under the charter. All the insurance was in effect at the time of the stranding hereinafter described.

The policies for the American Time Hulls form of insurance contained the following usual F. C. & S. clause:

> Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

The written instruments by which all insurance involved in this charter was originally effected and later renewed are in evidence as Plaintiff's Exhibits 34, 35, 36, 39 (1), 39 (2), 40 (1), and 40 (2), which are incorporated in these findings by reference.

In addition to the insurance secured by plaintiff, defendant assumed the expense of and secured endorsements to the policies, which endorsements extended warranted trading to include waters in the Western Hemisphere north of Vancouver Island.

6. There are and for many years have been two commonly used ship routes from Seattle, Washington, to Yakutat, [fol. 30] Alaska, and to other Alaskan ports to the north or west thereof. They are commonly referred to as "The Inside Passage" and the "Outside Route."

7. *Inside Passage.* From Puget Sound to Cape Spencer, Alaska, almost due west of Juneau, numerous islands lie along the coast of British Columbia and southeastern Alaska. The innermost of these islands are closely grouped and lie close to the mainland. For almost the entire distance, running in channels through the islands or between the islands and the mainland, there is an inland waterway, navigable by large ships and protected from the open sea. This waterway is known as "The Inside Passage." The course of ships such as the *Branch* using this route from Seattle, Washington, to Yakutat, Alaska, is shown by the red course-line on Plaintiff's Exhibit No. 6, in evidence herein, and made a part of these findings by reference.

The inside passage is narrow and tortuous, contains submerged rocks, reefs, and shoals, and swift, strong, and unpredictable currents. During the winter months, weather conditions are variable with the occurrence of much rain, wind, mist, fog, and snow, the climatic conditions combined with the geographical conditions constituting a substantial navigational hazard to vessels proceeding through the inside passage in January of any year.

Navigation of a ship the size of the *Branch* through the inside passage requires an experienced and competent pilot who is thoroughly familiar with the geographical and climatic conditions. He stands on the bridge and directs the helmsman, who, with the aid of a compass, steers the courses given to him by the pilot. A vessel such as the *Branch*, proceeding through and navigating the inside passage from Seattle, Washington, to Cape Spencer, is required to make frequent changes in course and to steer approximately 250 to 300 different compass courses. Some of the changes of course are gradual, while others are sharp and abrupt. When atmospheric conditions allow a clear view, the pilot directs the course from his observation of lights, landmarks, and other visual aids to navigation. During periods when fog, mist, rain, or snow obscure the visual aids to navigation, the pilot determines his courses by computing [fol. 31] them from compass bearings, the speed of the vessel, and the time elapsed on a given course, taking into consideration the state of the tide, currents, and other factors known to him from experience, charts, and other navigational references. Because of the narrowness of the channel, the determination of courses by these means is not sufficiently certain to insure keeping the vessel within a safe channel, and, when suitable shore conditions are present, pilots commonly supplement this method by estimating the position of the ship in relation to the constricting shores by sounding the whistle and computing the distance from the elapsed time between the sounding of the whistle and the return of the echo.

The inside passage is used regularly by ships such as the *Branch* where the cargo or passenger service requires them to stop at ports on the inside route and for certain passenger service where scenic beauty is a primary concern, but it is navigationally dangerous, particularly in the wintertime when weather conditions interfere with the observation of landmarks, lights, and other visual aids, and it has been the

scene of numerous vessel strandings and marine casualties.

In order to minimize such hazards when navigating the inside passage, a vessel such as the *Branch* needs to be equipped with and have on board (1) accurate and reliable standard and steering compasses, (2) experienced officers and pilots having knowledge of local conditions and hazards, and (3) experienced and competent helmsmen.

8. *Outside Route.* The outside route, an alternate route from Seattle, Washington, to Yakutat, Alaska, and other Alaskan ports to the north or west thereof, including Seward, Dutch Harbor, and Umnak Island, is and for many years has been through the Strait of Juan de Fuca, thence directly to Yakutat on generally northwesterly courses over the open Pacific Ocean and Gulf of Alaska, keeping to the westward of Vancouver Island, Queen Charlotte Islands, Baranof Island, and other islands of southeastern Alaska and British Columbia, which route is shown by the green course-line on Plaintiff's Exhibit No. 6.

A vessel navigating the outside route proceeds through open water and is subject to more severe force of wind and seas, but does not encounter the navigationally hazardous [fol. 32] geographical conditions encountered in the inside passage. The outside route is well away from land, rocks, reefs, and shoals, and has for its navigation the unrestricted deep water of the open ocean for freedom in maneuvering. The outside route from Seattle to Yakutat and the other points mentioned is the safer route navigationally at all times of the year for a vessel of the size and type of the *Branch* and laden as such vessel was laden on voyage No. 3, hereinafter described. The outside route is approximately 100 miles shorter than the inside passage and was the customary, most direct, expeditious, and usual peacetime route from Seattle to Yakutat and ports in Alaska north and west thereof for vessels of the size and type of the *Branch*.

In safely navigating the outside route from Seattle to Yakutat, there is not as great a necessity for accurate and reliable compasses, experienced officers and pilots having knowledge of local conditions, and competent helmsmen, as there is in navigating the inside passage.

9. Commencing as early as the summer of 1940, the responsible military officers of the United States Government believed that a military emergency in Alaskan territory was

brewing and the United States began to move men and materials into western Alaska for the establishment of military defenses against a possible attack by the armed forces of the Empire of Japan. The preparations steadily increased until they reached their maximum after war actually commenced. In October 1941, the United States Navy took control of all merchant shipping out of Seattle, and neither any merchant ship nor any United States Army Transport vessel was permitted to leave that port except on instructions from the Routing Officer of the Thirteenth Naval District and Northwest Sea Frontier, United States Navy.

10. Following the acceptance of the vessel by defendant on September 15, 1941, and until long after the stranding, the vessel was not employed commercially or operated as a merchant vessel but was a United States Army transport, employed by defendant as a public vessel of the United States and operated by Army employees. When the vessel was delivered to defendant, the master and certain officers of the vessel left their employment with plaintiff and became [fol. 33] and remained employees of defendant during the period here involved.

Following the delivery and acceptance and prior to her first voyage for the Army Transport Service, defendant altered and extended the passenger accommodations and fitted out the vessel for the transportation of troops and civilian personnel of the War Department, renamed or recommissioned the vessel for its use and service as the *United States Army Transport David W. Branch*, painted the United States Army Transport Service colors on her stack, and placed the initials "U. S. A. T." on her bow over the ship's name.

11. On her voyage No. 1 as a United States Army Transport, the vessel loaded at the Army and Navy bases in Seattle and left there about September 26, 1941, carrying troops and their impedimenta, civilian employees of the War Department, ammunition, and materials for the establishment of bases for defense. The vessel first proceeded from Seattle to Dutch Harbor following the Great Circle route over the open sea from Swiftsure Bank off Cape Flattery, State of Washington, to Umnak pass. The troops, civilian employees of the War Department, and cargo were discharged at their proper destinations at Dutch Harbor

and Nome and the vessel returned to Seattle by the same Great Circle route. The troops and civilian personnel were taken to the places mentioned to build and maintain military bases then under construction and the cargo was all for use in connection with such activities.

12. Between voyages Nos. 1 and 2, the vessel was repaired at Seattle and considerable alterations were made to permit the carrying of more troops. The vessel then took aboard war supplies, diesel oil, troops, and civilian employees of the War Department, for transportation to the war bases at Yakutat, Seward, and Dutch Harbor. She proceeded first to Yakutat by way of the outside route, thence to Seward, and thence to Women's Bay, Kodiak Island. She left Women's Bay on the morning of December 7. On that day defendant was attacked by the military forces of the Empire of Japan and thereupon the Congress of the United States declared a state of war to exist between defendant and the Empire of [fol. 34] Japan. Shortly thereafter a state of war was declared to exist between defendant and the German Third Reich and the Kingdom of Italy.

When approaching Dutch Harbor on December 7, the master of the *Branch* was notified by the *U. S. S. Spica* of the enemy attack on Pearl Harbor, that a state of war existed between the United States and the Empire of Japan, and that all precautions, including blacking out the vessel, must be taken. Thereupon the vessel was immediately armed with guns taken from the cargo and the guns were manned by the troops on board. Special lookouts were maintained and the vessel was put on a war basis. She arrived at Dutch Harbor on December 9 and at Dutch Harbor she was painted with the gray war color, her ports were painted over so that no light could show through, and temporary blackout screens and doors were installed.

On December 22, under orders and directions from the United States Navy, she proceeded from Dutch Harbor in convoy, evacuating officers' wives and children and civilian employees of the War Department. Because of the danger from enemy submarines, the convoy pursued a zigzag course to Kodiak, as directed by the Navy. From Kodiak the vessel proceeded in convoy to Cape Spencer and from there it proceeded independently to Seattle by way of the inside passage, the entrances to which were guarded against submarines by naval patrols.

Immediately after the vessel's arrival in Seattle, defendant repainted her throughout with war colors and placed 50-caliber guns on her bridge, boat deck, bow, and stern, for protection in case of emergency. United States Army gun crews, to man the guns, were put aboard the vessel before sailing on voyage No. 3.

13. At all times after the *Branch* was chartered by defendant up to and at the time of the vessel's stranding on January 13, 1942, the port of Seattle, including the United States Army Port of Embarkation and the United States Navy Base, Pier No. 40, was a principal base of military supply and was the base of supply for defendant's military activities and operations in Alaska. During all of the period of voyage No. 3, the whole of Alaska and the waters adjacent [fol. 35] thereto were under military restriction, were a war zone, and were areas of military activities being conducted by defendant in the prosecution of the war in defense of Alaska against enemy operations. Yakutat, Seward, Dutch Harbor, Kodiak Island, Umnak Island, Chernofski, and "Westward" projects were war bases, bases of war operations, and areas of war activities. "Westward" was a code name conferred on the establishment and operation of secret bases at Fort Glenn on Umnak Island and Fort Randall at Cold Bay, both within fighter plane striking distances of defendant's military installations at Dutch Harbor. The preparation of these bases resulted from advance information that an attack on Dutch Harbor was imminent, and the "Westward" projects were established for the purpose of protecting the Dutch Harbor military base which was the most westerly base then defended by the United States forces.

The construction at "Westward" had been planned, surveys had been made, and some troops had been stationed there for defense purposes prior to voyage No. 3, but actual construction had not yet started. At Yakutat, Seward, and Dutch Harbor actual construction had been under way for a substantial time prior to voyage No. 3. No enemy air or land activity took place in Alaska until a considerable time after the stranding of the *Branch*.

14. Prior to her departure on voyage No. 3, and on January 7, 1942, the vessel was moved to the Navy deperming station at Port Orchard, alongside Bremerton Navy Yard

in Puget Sound. The deperming consisted of removing all compasses, clocks, chronometers, and barometers from the vessel and passing wire cables around the *Branch* to make a coil; then energizing the coil with electric current of a calculated force and for a calculated length of time and in the necessary direction to demagnetize the hull of the ship to within safe limits to neutralize its effect on magnetic mines. All ships sailing out of Seattle were either depermed or degaussed within a few weeks after the beginning of the war. Degaussing was another process also designed to prevent steel ships from attracting magnetic mines. The deperming process to which the vessel was subjected created an unstable and variable magnetic condition in the vessel [fol. 36] which in turn created an unstable, variable, and unreliable condition of her magnetic compasses when reinstalled. The effect was to cause the compasses to "wander" and to be undependable for maintaining a course.

In normal circumstances a vessel such as the *Branch* would not put to sea with the compasses in that condition. The independent compass adjuster employed to adjust the compasses after deperming warned the master of the vessel of the probable effect of the deperming upon the magnetic compasses, but because of the urgent military necessity for the transportation of the personnel and materials on board the vessel to the war bases in Alaska, the voyage was undertaken notwithstanding the known unreliable condition of the compasses.

15. On January 11, 1942, the *Branch* departed on voyage No. 3 from the United States Army Port of Embarkation in the port of Seattle where she had been loaded, being engaged in the carrying of passengers and cargo under "secret" and "confidential" cargo manifest to war bases at Yakutat, Dutch Harbor, Seward, Umnak Island and "Westward." She was laden solely with defendant's military personnel, civilian employees of the War Department, officers and troops of defendant's armed forces, and defendant's military supplies and other materials and supplies for use directly or indirectly in prosecuting the war, including: ammunition and guns, troops impedimenta, army motor trucks, trailers, tractors and jeeps, explosives, K-D houses for housing of military personnel, Army Signal Corps equipment, diesel oil, military construction materials, machinery and equipment, troop clothing, food rations and

supplies, all of which more fully appear from the passenger list and cargo manifest, both of which are in evidence herein as Plaintiff's Exhibits Nos. 2 and 4, as amplified by Defendant's Exhibits F and G, and all of which are made a part of these findings by reference. Among the cargo were clothing and miscellaneous supplies to be sold at the post exchanges at the Alaskan bases to civilians and troops engaged there.

To her first port of call she was carrying 5,246 barrels of diesel oil consigned to "United States Troops—Yakutat," a well-established actively operating military base. The re- [fol. 37] mainder of her cargo destined to her other ports of call was consigned to various branches of the armed forces, to-wit: "U. S. Army Engineers," "Quartermaster Corps," "Resident Engineer U. S. E. O.," "Quartermaster Captain Edgar W. Wheeler," "Company 'E' and 'F' and 'H' 153rd Infantry," "U. S. Troops Westward," "Ordinance Officer Westward," "Quartermaster Westward," "Battery E 161st Field Artillery," "Quartermaster Depot Westward," "U. S. Engineers Westward."

16. The first port of call on such voyage No. 3 was Yakutat, Alaska, and the other ports of call were Seward, Dutch Harbor, Umnak Island, Chernofski, and "Westward." In the month of January 1942, prior to and during voyage No. 3 of the *Branch*, there was evidence of the presence of enemy submarines in the waters traversed by the outside route. Knowing that if the vessel were directed to follow and followed the outside route on her voyage No. 3 from Seattle, the vessel would have been openly exposed to hostile enemy action, and fearing the destruction or damage to the vessel, her passengers and cargo, and to avoid such consequences, defendant's Navy Routing Officer directed and ordered the vessel to proceed on voyage No. 3 by way of the inside passage, as a calculated risk, under a preconceived War Plan, the navigational risks of the inside passage being considered overbalanced by the menace of submarines on the outside. Sailing Orders, dated January 11, 1942, were issued by the Army Transport Service to the master of the *Branch* and provided in part:

> 2. Having completed the embarkation of passengers and the loading of cargo and supplies, your cargo and supplies being properly stowed, your passengers safely

aboard and, when in all respects ready for sea, you will sail for ports as directed above.

* * * * *

4. The vessel will be navigated at an economical speed, depending on the weather and the rules of safety. Special consideration will be given the safety of navigation, due to the weather conditions prevailing at this season of the year.

* * * * *

8. You are directed to comply with the following instructions received from Port Director, U. S. Navy:

[fol. 38] (a) In proceeding northbound to Yakutat, Seward and Chernofski, you will follow the inside passage from Georgia Strait to Icy Strait avoiding Hecate Strait if practicable. Homebound from Chernofski vessel will also proceed via inside passage. However, vessel may proceed via Hecate Strait if pilots are not familiar with inside passage or if some other urgent reason makes it necessary to use Hecate Strait.

(b) You will comply with such additional instructions relative to the exact course you are to follow as may be given you by the Port Director, U. S. Navy, 13th Naval District.

Hecate Strait is a large body of water lying behind the Queen Charlotte Islands, which with Queen Charlotte Sound opens onto the ocean on a large front and was a potential aria of submarine attack.

The master also received instructions from the office of the Navy Routing Officer to proceed at her maximum full ahead speed, which was in excess of her normal and usual peacetime speed, and was so operating at the time of her stranding.

17. In navigating a ship such as the *Branch* through the inside passage under the conditions which prevailed on the night of January 13, 1942, at and near the time of the stranding, the customary, usual, and normally safe procedure briefly is as follows: The pilot stands on the bridge where he has a clear view of the beacon lights along the channel and, so far as darkness and atmospheric conditions permit, of the land. He fixes his course in relation to a light or

lights ahead and gives an order to the helmsman who turns the ship to the right or to the left the proper distance to bring the ship onto the course the navigator has directed. The bridge and the pilot-house, which contains the wheel, are completely dark except for a dim light shining on the compass. When the ship has been set upon the course desired, the pilot asks the helmsman what the compass bearing is and directs the helmsman to hold the ship on that bearing. The pilot continues watching the beacon lights or other visual landmarks and can observe from such visual observation whether the vessel is maintaining the course as directed.

A local geographical magnetic influence or an unneutralized magnetic influence in the ship may cause the compass to deviate, and, in such a situation, if the helmsman keeps [fol. 39] the ship upon the compass bearing, the ship will swing from the actual course intended by the pilot. Such magnetic influences are usually known and due allowance is made for them. Where the influence is not anticipated and, for that or any other reason the ship commences to swing, it becomes apparent to the pilot from the relation of the ship to the beacon lights, and he directs the helmsman to turn the wheel so as to bring the vessel back on the course intended. The helmsman watches the lighted compass continually and his eyes are not so well adjusted to the outside darkness as are the eyes of the pilot. His duty is to follow implicitly the orders of the pilot and to exercise no independent judgment in following a course except to keep the vessel on the course directed by the pilot. He does not watch the beacon lights or the landmarks for the purpose of steering the ship, but steers by the compass under directions from the pilot. This was the procedure being followed by the pilot and the helmsman on the night of January 13, 1942, prior to the stranding.

18. On January 13, 1942, about 10:38 p. m., the *Branch* was at approximately latitude 54° 1′ North, longitude 130° 14′ West of Greenwich, abeam Herbert Reef on its port. Herbert Reef is approximately two miles south of Hanmer Island. There had been rain and mist earlier in the day, but the weather had cleared so that Hanmer Island was visible from the vessel as were the beacon lights at Genn Island and Lawyer Island beyond Hanmer Island to the northwest. The distance from Herbert Reef to Lawyer Island is approximately seven miles. The pilot went into

the chart room to check the time and the courses, leaving the master on the bridge. On passing Herbert Reef the master lined up the vessel with the Genn Island light about 4° on the starboard bow, which placed the course of the vessel approximately 350 yards, or a little better, to the west of Hanmer Island, a proper and safe course for navigating the reach from Herbert Reef past Hanmer Island. The pilot returned to the bridge about 10:42. After the pilot's eyes became adjusted to the dark, the master, having made sure that the pilot had seen the beacon lights and Hanmer Island and having seen that the vessel was on a safe track, went into the chartroom.

[fol. 40] Because of manpower shortage due to the war it was difficult to procure experienced and competent helmsmen, and for that reason the helmsmen on board were incompetent and inexperienced and there was a standing order for the mate on watch to stand alongside the helmsman to watch his steering. When the master got into the chartroom he found there the second mate who should have been watching the helmsman. He sent the second mate back to the pilot-house immediately. Shortly thereafter the pilot noticed the Genn Island light blocking out, which showed that the vessel had diverged from its course far enough that Hanmer Island was coming between the ship and the Genn Island light. The pilot called, "Left", to the helmsman, but the helmsman swung to the right and the vessel continued to diverge from the directed course. The pilot then shouted, "Hard left," but the helmsman swung hard right. This pulled the vessel away from the safe channel and toward Hanmer Island.

On hearing these commands, the master knew that something unusual was occurring and immediately returned to the bridge, but his eyes had adjusted themselves to the lights of the chartroom, and when he came out on the bridge he could not see in the darkness sufficiently well to observe the situation and to give an immediate order. The second mate jumped to the wheel and put it hard left. In about a minute the master could see the island near at hand and ordered the vessel full astern. Almost immediately after that the vessel hit the partially submerged reef which is a part of the island. This occurred at 10:46 p. m.

The instability of the steering compass as a result of the deperming operation may have been a contributing factor to the ship's deviation from her course. The stranding

would not have occurred, however, if the helmsman had been competent and had obeyed the directions of the pilot.

The officers of the vessel in charge of navigation and the pilot on voyage No. 3 were experienced and capable in the navigation of the outside route, but were inexperienced and without adequate local knowledge of the conditions and hazards to be encountered in the waters of the inside passage.

19. As a direct consequence of the stranding, the vessel suffered severe damage to her hull, machinery, and appur- [fol. 41] tenances, and in order to release the vessel from her strand it become necessary to jettison a portion of her cargo and to transfer the remainder thereof to other vessels for immediate carriage to destination, and to otherwise undertake and carry out extensive salvage operations. After being released from her strand the vessel was returned to the port of Seattle, where repairs to her hull, machinery, and appurtenances were promptly carried out and satisfactorily completed at 12:00 noon April 13, 1942, through the joint and combined efforts of plaintiff and defendant.

Plaintiff, as owner of the vessel, without prejudice to the question of ultimate liability therefor under the charter party, was requested to and did incur and expend, in connection with the repairs to said vessel and said salvage operations, including general average, the reasonable sum of $372,470.07. Defendant has paid plaintiff on account of general average the sum of $26,954.49, reducing plaintiff's net expenditure to $345,515.58.

The charter party provides in part:

> (6) Hire. (a) The Government shall pay to the Owner the sum of $3.50 per deadweight ton for the use of the vessel, payments to be made monthly as earned, commencing on and from the day and hour of delivery, * * * hire to continue until the day and hour when the vessel is redelivered to the Owner except: * * * (3) if the vessel is damaged or injured under any of the risks herein assumed by the Government, to the extent that she is no longer fit for the Government service, the Government may, for the purpose of computing hire, but for no other purpose declare the vessel constructively lost by giving written notice to the Owner

or its representative, in which event hire shall cease and this Charter Party shall terminate; * * *

The vessel was not damaged to the extent that she was no longer fit for defendant's service. The defendant did not for the purpose of computing hire or otherwise, declare said vessel constructively lost, by giving written notice to plaintiff or its representative, or otherwise. Plaintiff has demanded payment and defendant has failed and refused to pay plaintiff charter hire for the period beginning at 10:46 p. m. January 13, 1942, the time of the stranding, and continuing to 12:00 noon April 13, 1942, when the repairs were [fol. 42] satisfactorily completed. At the rate specified above, charter hire for such period would be the sum of $60,085.57.

Plaintiff has performed and carried out all obligations, matters and things required by or provided in said charter party to be performed and carried out by plaintiff as the owner of the vessel.

20. Following the stranding and prior to the institution of this action plaintiff received from London Marine Underwriters the total sum of $342,170.48. That sum was received pursuant to and under the conditions of the following loan agreement stated in the following telegram:

> 428 Branch have now obtained agreement underwriters settle as loan without interest and repayable only to extent any recovery obtained from Government it being condition of loan that owners make application for such recovery and lend use their name and give assistance obtain any recovery stop please cable acceptance enable us proceed collection

The sum received from the Fireman's Fund Insurance Company was received pursuant to and under the conditions of the following loan agreement:

(Loan Receipt)

> Received from Fireman's Fund Insurance Company the sum of One Thousand Five Hundred Seventy and 27/100 Dollars ($1,570.27) as a loan and not as payment of any claim, repayable only out of any net recovery the undersigned may make from any vessel, carrier, bailee, or others upon or by reason of any claim for the

loss of or damage to the property described below, or from any insurance effected by the undersigned or by any carrier, bailee or others on said property, and as security for such payment we hereby pledge to the said Insurance Company all such claims and any recovery thereon.

In further consideration of the said advance, we hereby guarantee that we are the persons entitled to enforce the terms of the contracts of transportation set forth in the bills of lading covering the said property; and we hereby appoint the agents and officers of the said Insurance Company and their successors, severally, our [fol. 43] agents and attorneys in fact, with irrevocable power to collect any such claim and to begin, prosecute, compromise or withdraw, in our name, but at the expense of the said Insurance Company, any and all legal proceedings which they may deem necessary to enforce such claim or claims, and to execute in our name any documents which may be necessary to carry into effect the purposes of this agreement.

Executed in duplicate at Chicago, Ill., this 16th day of August 1943.

Libby, McNeill & Libby, By A. M. Jasper, Treasurer.

* * * * * * *

Without Prejudice as to Whether War or Marine Risk

No agreements or understandings existed between plaintiff and said underwriters other than as set forth in and evidenced by the foregoing loan agreements.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record herein, the amount thereof to be entered by the Clerk and collected by him according to law.

Opinion

Madden, Judge, delivered the opinion of the court:

The plaintiff on September 15, 1941, bareboat chartered its vessel, the *David W. Branch*, to the Government. The

vessel was a combination passenger and cargo vessel of a gross tonnage of 5,544 tons. Under the charter the Government was to man and supply the vessel, pay the costs and expenses of its operation, and pay a stated hire for the use of the vessel, with a suspension of hire for any "loss of time caused by damage to or by the said vessel under any of the risks herein assumed by the owner or in [fol. 44] making any repairs or replacements for which owner is liable." The charter contained the following provisions, here pertinent, relating to insurance:

> Owner shall at its own expense assume the usual American Time Hulls form of insurance for owner's and charterer's account, giving the charterer the benefit of such insurance. Owner or insurer shall have no right of recovery or subrogation against the charterer (Government) on account of loss or damage covered by such insurance.
>
> (b) Charterer shall assume all other risks, including war risk (whether or not there shall be a declaration of war.) * * *

A new insurance policy, taken out by the plaintiff on December 31, 1941, upon the expiration of the policy in force at the time of the charter, contained an endorsement by the insurance company saying:

> It is agreed for the period of the charter of the above-named vessel to the United States Government * * * this insurance is extended also to cover the interest of the United States Government.

The policy was the usual American Time Hulls form of policy and contained the usual F. C. and S. (Free from Capture and Seizure) clause, reading as follows:

> Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a decla-

ration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

The present litigation concerns and depends upon the interpretation and application of these insurance provisions to the facts hereinafter stated. For the present, we state merely that the vessel was, during its operation by the Government under the charter, stranded and severely damaged. The question is, was the damage a consequence of a warlike operation, and therefore not covered by the plaintiff's pol- [fol. 45] icy. If it was not, the Government must pay for the damage, since, as we have seen, it assumed "all other risks, including war risk * * *."

The chartered vessel, the *Branch*, was in the possession of the Quartermaster Corps, which then operated the Transport Service of the War Department. The vessel was used to transport supplies and personnel between Seattle, Washington, and Alaskan ports, for the War Department. It was manned with civilian officers, some of whom, including the master and the pilot on watch at the time of the stranding, had been previously employed by the plaintiff, and with a civilian crew. The vessel was designated as an Army Transport, was painted gray, and was equipped with guns manned by an armed guard.

In January 1942 the *Branch* was loaded at the port of Seattle with materials for the construction of air bases in Alaska, food, kitchen supplies and diesel oil, and "troop cargo." The passenger list contained 133 civilians for employment in the construction of the air bases, and some 160 officers and enlisted men of the Army and Navy. Before sailing, the *Branch* was "degermed." This process is described in Finding 14. It was for the purpose of eliminating the attraction which a steel vessel would otherwise have for magnetic mines. During the degerming the compass and other navigational instruments were removed. After degerming they were replaced, but the accuracy of such instruments may be and on the *Branch* was affected for some time by the unstable and variable magnetic condition produced in the vessel by degerming. The *Branch* was directed to sail by the "Inside Passage" which is described in Finding 7, rather than by the open ocean outside the coastal islands. See Finding 8. The outside route is shorter and is the route normally followed in peacetime. But ships

whose passenger or cargo service require them to stop at ports on the inside route, and ships which exploit the scenic beauty of the islands and mainland, use that route regularly in peacetime. It is, however, narrow and tortuous, contains submerged rocks, reefs and shoals and swift, strong, and unpredictable currents. In winter there is frequently rain, wind, mist, fog, and snow which, when it [fol. 46] occurs, adds to the hazards of navigating that passage. However, the apprehended peril from Japanese submarines caused the Government to choose to use the inside passage for its own ships unless they could be heavily convoyed, and to require ships operated by private owners to use it. The *Branch* was, therefore, under orders to use the inside passage here involved.

The *Branch* left Seattle on January 11, 1942. She proceeded without incident until, at 10:38 P. M. on January 13, she was at latitude 54°1′ North abeam Herbert Reef on her port. Herbert Reef is some two miles south of Hanmer Island. The night was clear and the beacon lights at Genn Island and Lawyer Island, seven miles north, were visible. The pilot, who stands on the bridge to watch the beacon lights and give orders to the helmsman, went to the Chart Room to chart the time and courses leaving the master on the bridge. On passing Herbert Reef the master lined up the vessel with the Genn Island light about 4° on the starboard bow which placed the course of the vessel approximately 350 yards to the west of Hanmer Island, a proper and safe course for navigating past that island. The pilot returned to the bridge at about 10:42. After the pilot's eyes had become adjusted to the dark, the master, having made sure that the pilot had seen the beacon lights and Hanmer Island, and that the vessel was on a safe course, went to the Chart Room. Because of manpower shortage due to the war it was difficult to procure competent and experienced helmsmen and there was a standing order that the mate on watch stay with the helmsman to watch his steering. However, when the master got to the Chart Room he found the mate there. He sent him immediately to watch the helmsman. The pilot noticed that the Genn Island light was blacking out which showed that the ship was veering toward Hanmer Island. He called "left" to the helmsman, but the helmsman steered right. He shouted "Hard left" but the helmsman swung hard right. The second mate jumped to the wheel and put it hard left.

The master, who had heard the excited commands and had returned to the bridge, saw Hammer Island nearby and ordered full astern. But the vessel hit a submerged reef which is a part of Hammer Island, and stranded. This was at 10:46 P. M.

[fol. 47] The stranding of the *Branch* caused severe damage to her hull, machinery and appurtenances, and in order to release the vessel it became necessary to jettison a part of her cargo and transfer the rest to other vessels for carriage to destination, and to otherwise carry out extensive salvage operations. After her release she was returned to Seattle and repaired, and was again ready to sail on April 13, 1942. The plaintiff spent, in connection with the repairs and salvage operations, including general average, the reasonable sum of $372,470.07. The Government has paid the plaintiff on account of general average $26,954.29 leaving the plaintiff out of pocket $345,515.58. The plaintiff has received from the insurance company which issued the American Time Hulls policy $342,170.48 as a loan without interest and repayable only to the extent that the plaintiff may obtain recovery from the Government.

The question is, of course, whether the risk of the loss which occurred here was carried by the insurance company which issued the American Time Hulls policy, or by the Government. The answer depends, as we have said, upon the interpretation and application of the insurance provisions of the charter agreement, which we have quoted above. The policy expressly excepted from coverage those losses which were "consequences of hostilities or warlike operations."

The Government contends that the *Branch* was not at the time of her stranding engaged in a warlike operation. We think she was. She was in possession of and being operated by the Army and was loaded with materials and persons being transported for the Army's war purposes.

We thus reach the question whether the loss here sued for was a "consequence of a warlike operation." To be a consequence is, we suppose, to be the result of a cause. Since the parties to these agreements were creating important legal relations, which might find their enforcement in litigation, we may assume that they were writing of legal consequences resulting from legal causes. We look therefore to the legal doctrines which have developed around

the much litigated problem of causation. Was the fact that the *Branch* was engaged, as we have concluded that she was, in a warlike operation, the legal cause of her stranding? Since most of the litigation in which the ques-[fol. 48] tion of causation has been considered has been litigation concerning negligence, we look to such litigation for our principles. We recognize that the problems of causation are not quite the same in negligence litigation and in the instant case. Before the question can arise in a suit based upon negligence it must be found that the defendant was negligent. Then comes the question whether his already proved negligence was the legal cause of the injury, that is, whether he must pay for the harm which occurred. But having already concluded that the defendant is guilty of negligence, there is, of course, a considerable human urge, even in the judicial mind, to find a responsible connection between the negligence and the damage. In the instant case there can be, of course, no such urge. It was not negligent, or otherwise wrongful, to engage in warlike operations when the country was at war. The Government, so engaging, should be liable for the risks which it by its contract agreed to carry, but only for those risks.

In the law of torts it is elementary that the mere fact that event B would not have happened "but for" the happening of event A does not make A the legal cause of B nor B the legal consequence of A. The fact, therefore, that the ship would not have been where she was, and hence would not have been stranded "but for" the fact that she was engaged in the warlike operation, does not help to answer our question.

The fact that the ship was on the inside passage rather than in the open ocean was not a consequence of her warlike operation. If she had never been chartered to the Government but had been retained and operated by the plaintiff carrying civilian passengers and merchandise, she would have navigated the inside passage if she had navigated in that direction at all. The incompetence of her helmsman, because of a shortage of competent helmsmen would have been just as likely to occur under civilian operation, since the helmsman would have been obtained from the same labor market. Private ships were "depermed" to protect them from magnetic mines in the same way that the plaintiff's ship was depermed, and if the ship had remained in the

plaintiff's possession it would have been depermed as soon as there was opportunity. The fact then that her compass [fol. 49] was made inaccurate by the deperming was not a consequence of her warlike operation. These facts, sailing the inside passage, the incompetent helmsman, and the wandering compass, were the consequences of the war, but were not the consequences of the warlike operation of the plaintiff's ship. They could just as readily have happened to any ship operating in wartime, but without any connection with the war.

We now consider the decisions in which the very language involved in the insurance arrangements here in question has been interpreted and applied to various fact situations.

In *Queen Ins. Co.* v. *Globe Ins. Co.*, 263 U. S. 487, the ship *Napoli* in the summer of 1918 sailed from New York for Genoa with a cargo, a part of which was intended for the Italian Government, and a small part of which was munitions of war. All of the cargo was contraband. At Gibraltar the ship joined a convoy, as it was practically necessary to do, though not ordered by the military powers. The convoy sailed with screened lights, protected by British, Italian, and American war vessels, and navigated by an Italian commander on the *Napoli*, subject to the command of a British captain as the senior naval officer present. The *Napoli's* convoy met another convoy head-on, there was confusion, and a British steamship in the other convoy struck and sank the *Napoli*. The court, in its opinion written by Justice Holmes, held that the loss of the *Napoli* was not a "consequence of a warlike operation" within the meaning of the insurance policy language. It said that the common understanding in construing these policies is that the courts are not to take "broad views" but generally are to stop their inquiries with the cause nearest to the loss. The thought apparently expressed was that, the loss having been occasioned by the collision of two merchant ships, the more remote facts that they were sailing in convoy and with screened lights because of the war were not legal causes of the collision and loss. The court relied upon the decision of the House of Lords in the cases of the *Petersham* and of the *Matiana*, heard and decided together, *British Steamship Co.* v. *The King*, [1921] 1 A. C. 99. In the case of the *Petersham*, it was a vessel chartered to the crown, sailing without lights because of Admiralty regulation and it collided with a Spanish vessel, also sail-

ing without lights. It was found that, because of the [fol. 50] absence of lights, the collision could not have been avoided by reasonable care. It was held that the loss was a result of a "peril of the sea", i. e. a collision, and not a "consequence of a warlike operation." In the case of the *Matiana* a vessel sailing in convoy struck a reef without negligence on the part of the master, or of the naval officer in charge of the convoy. Again it was held that the loss was not a consequence of a warlike operation.

In the *Queen Ins. Co.* case, *supra*, the court said, "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * *." This statement is heavily relied upon by the plaintiff, for reasons that will become apparent.

In the case of *General Insurance of America* v. *Link, et al.*, 173 F. (2d) 955, the United States Court of Appeals for the Ninth Circuit held that a loss caused by a collision of a small armed navy oil tanker with a privately owned merchant ship, due to the fault of both ships, was a consequence of a warlike operation. The court points out that the *Queen Insurance Co.* case, *supra*, did not involve "the wrongful commands of naval officers directing the navigation of an armed naval vessel in a war service." Although we have found that the *Branch* was engaged in a "warlike operation," that operation did not answer the description just quoted and relied upon to distinguish the *General Insurance Co.* case from the *Queen Insurance Co.* case. The Court of Appeals for the Ninth Circuit relied upon the House of Lords decision in *Board of Trade* v. *Hain S. S. Co. Ltd.* [1929] A. C. 534, where a British steamship, under requisition to the Government, collided with a ship operated by the United States as a mine planter, officered and manned by Navy officers and crew. Both vessels were negligent. It was held that the loss was the consequence of a warlike operation, that of the American mine planter. In the case of *Attorney General* v. *Adelaide Steamship Co.* (*The Warilda*) [1923] A. C. 292, the House of Lords held that where the steamship *Warilda*, requisitioned by the Admiralty and used as an ambulance transport, was proceeding from Havre to Southampton with 603 wounded men and a staff of doctors and nurses abroad, and, in accordance with Admiralty instructions was steaming at top speed and without lights, and struck a merchant vessel proceeding [fol. 51] at top speed with dimmed side lights, the damage

to both ships was a consequence of a warlike operation, that of the *Warilda*. It was held that the negligence of the master of the *Warilda* should not affect the decision.

We come now to the case upon which the plaintiff relies most strongly, the recent decision of the House of Lords in the case of the *Coxwold*, the full title of which is *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport*, [1942] A. C. 691, 58 *The Times* L. R. 263. In that case the use of the vessel had been requisitioned by the British Government, and the vessel, while carrying a military cargo in convoy, altered her course under orders of the Naval Commodore in charge of the convoy, to avoid what was thought to be an enemy submarine, and ran aground.

The House of Lords decided that the loss was a consequence of a military operation. Some of the learned lords, including Viscount Simon, the Lord Chancellor, p. 700 of the A. C. report, and Lord MacMillan, id. p. 702, seem to have rested their conclusions on the fact that the arbitrator, who had first decided the case, had concluded that the stranding was a consequence of military operations, and that the courts had "no right to reverse this conclusion, unless the facts found by him cannot support it." On this basis, the decision would not be of great importance, as it would leave to the first trier of the facts a good deal of leeway, just as a jury in a negligence case has leeway to find that the negligence was or was not the cause of the loss. But others of the lords used language much more inclusive. Lord Wright said:

> The warlike operation is (as it were) an *umbrella* which covers every active step taken to carry it out, including the navigation, the course or helm action intended to bring the vessel to the position required by the warlike operation, and that none the less because accident, mischance, or negligence lead to stranding or collision.

Lord Porter said:

> The logical conclusion of these observations would seem to be that, in a case where the warlike operation consists in passing from one war base to another, any accident due to proceeding between the starting and finishing point is caused by the warlike operation.

[fol. 52] Lord Atkin said:

> * * * if in the course of a warlike operation the direction of the ship's course against another ship is a consequence of a warlike operation, *Attorney-General* v. *Ard Coasters* (37 The Times L. R. 692; (1921) 2 A. C. 141), it is surely impossible to distinguish the case where the course of the ship is directed against a rock, and this whether negligently or without negligence, and whether the ship is deflected by tide, or current or wind. * * *.

We think, then, that the present English interpretation of the insurance clause in question is that when a casualty occurs to a ship which is engaged in a warlike operation, as a result of any activity of the ship, the loss is a consequence of the warlike operation. The development of the English law toward this conclusion is traced by Lord Wright in his opinion in the case of the *Coxwold*, *supra*. The end result seems to us to make the expression about a loss which occurs as a "consequence of a warlike operation" mean a loss which occurs "while the ship is engaged in a warlike operation." We do not think that these expressions are identical in meaning. They are not treated so in the law generally. In the Restatement of Torts, Vol. 2, Negligence, Section 281, the following illustration is given:

> 2. A gives a loaded revolver to B, a boy of eleven, to carry to C. In handing the revolver to C, the boy drops it, crushing the bare foot of D, a comrade. The fall discharges the revolver, wounding C. A is liable to C but not to D.

We think that there must be some causal relation between the warlike operation in which such a ship as the *Branch* is engaged, and the casualty in question, before the casualty can be regarded as a consequence of the warlike operation. In addition to being urged to that conclusion by general legal principles, we think that this must have been the intention of the parties in making their contracts. The *Branch* was chartered to the United States in September 1941, the charter being negotiated by the Assistant Superintendent, Army Transport Service. The plaintiff thus knew what the ship was going to be used for. The charter, as we have said, required the plaintiff to carry ordinary marine insurance. The [fol. 53] current policy expired on December 31, 1941. In the new policy, issued as of that date, the insurance com-

pany attached an indorsement recognizing the charter arrangement, and extending the policy to cover the interest of the United States. We were, of course, then at war. If the broad expressions of the *Coxwold* decision, *supra*, are to be followed, all of these careful arrangements were substantially meaningless, because the policy did not protect anyone against any loss of a kind which, in fact, was likely to happen.[1] The plaintiff was, in effect, wasting its money in buying the insurance, and the insurance company was getting its premium for carrying substantially no risk.

We think that the parties must have intended that the marine insurance should cover the risks which the ship would have been subject to if she had been operated by her owner for the owner's commercial purposes. The ship would have been just as likely to have run aground if so operated, as it was when operated by the army. It would have had the perils of the inside passage, the unreliability of the compass resulting from deperming, and the dangers of having an incompetent helmsman, due to the shortage of experienced labor. The only change in actual navigating conditions resulting from the ship's military errand was the slightly increased speed, and that had nothing to do with the ship's stranding.

We conclude, therefore, that the casualty which befell the *Branch* was not a consequence of a warlike operation, and that the Government is under no contractual liability to compensate the plaintiff for the loss. The plaintiff's petition will be dismissed.[2]

---

[1] See the statement of Lord Porter in the *Coxwold* case, *supra*, that "almost any casualty befalling a vessel as a result of her own action in proceeding on a voyage, in a case where proceeding on that voyage was a warlike operation, was caused by a warlike operation * * *."

And see the statement in the plaintiff's brief at page 164 that "Almost every casualty to a vessel occurring during a warlike operation is caused by and is a consequence of the warlike operation."

[2] The conclusion which we have reached is in accord with the decision of the United States Court of Appeals for the Second Circuit, in the case of *United States* v. *Standard Oil Company of New Jersey*, decided December 15, 1949. Judge Clark's excellent opinion in that case has come to our attention too late to be discussed in this opinion.

It is so ordered.

Littleton, Judge; and Jones, Chief Judge, concur.

[fol. 54] WHITAKER, Judge, concurring:

I agree that plaintiff's petition in this case should be dismissed, but I come to this conclusion for a somewhat different reason from that stated by the majority.

The exception in the insurance policy taken out by the charterer read in part: "also from all consequences of hostilities or warlike operations * * *." It seems to me that the opinion of the majority overlooks the word "hostilities." I think it is clear that the *Branch* was in the Inland Passage in consequence of hostilities, and I think it is clear that it was "depermed" in consequence of hostilities.

However, the Inland Passage could be safely navigated with due care by a vessel that had been depermed and whose compass in consequence was out of order. It could have been safely navigated even though the helmsman was inexperienced, provided the mate had done what he had been told to do, that is, if he had stayed with the helmsman. I think if he had obeyed orders and been beside the helmsman when the order was given to turn left, he could have stopped the helmsman from turning to the right. This, it seems to me, was the cause of the loss and I do not think it can be said that the loss came about in consequence of hostilities or warlike operations.

If it had been extremely hazardous to sail a depermed vessel in this Inland Passage, my opinion would probably be different, but the proof shows that vessels can be safely operated in this passage if due care is exercised. I do not think due care was exercised in this case and that this was the cause of the loss.

Howell, Judge, concurs in the foregoing opinion.

[fols. 55-56] NOTE RE EXHIBITS

Plaintiff's Exhibits Nos. 1, 2, 4, 6, 34, 35, 36, 39(1), 39(2), 40(1), 40(2) and Defendant's Exhibits F and G, Made a Part of the Findings of Fact by Reference Accompany This Record under Separate Cover.

[fols. 57-58] JUDGMENT OF THE COURT—January 3, 1950

At a Court of Claims held in the City of Washington on the 3rd day of January, A. D. 1950, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover.

It is therefore adjudged and ordered that the plaintiff's petition be and the same is hereby dismissed.

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1949

No. —

LIBBY McNEILL & LIBBY, a corporation, Petitioner,

vs.

UNITED STATES OF AMERICA

STIPULATION AS TO PRINTING OF RECORD

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that for the purposes of petitioning for a writ of certiorari, none of the exhibits contained in the certified Transcript of Record need be printed.

It is further stipulated and agreed that the parties hereto may refer to the portions of the certified Transcript of Record not included in the printed record.

Signed at Washington, D. C., this 28 day of March, 1950.

Edward G. Dobrin, Stanley B. Long, Counsel for Petitioner, Libby, McNeill & Libby, a corporation: Philip B. Perlman, Solicitor General of the United States of America.

[fol. 61] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 5, 1950

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary docket and assigned for argument immediately following Standard Oil Company of New Jersey vs. The United States of America, Nos. 663 and 664.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~ 1950

No. ~~710~~ 37

LIBBY, McNEILL & LIBBY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, AND BRIEF IN SUPPORT THEREOF.

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BOGLE, BOGLE & GATES,
Of Counsel.

INDEX

Cases Cited

Petition:

AUTHORITIES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 710

LIBBY, McNEILL & LIBBY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Libby, McNeill & Libby, a corporation, that a writ of certiorari be issued to review the decision and judgment of the United States Court of Claims, entered January 3, 1950 (Tr. 15, 43), respectfully shows to this Honorable Court:

Opinion of the Court of Claims

The special findings of fact and opinion of the Court of Claims and concurring opinion (Tr. 15), is reported in 87 F. Supp. 866.

Statement of Matter Involved

1. *The Stranding.*

The USAT David W. Branch, owned by petitioner, was being navigated by and in the service of the United States,

bareboat charterer, as an Army Transport under the jurisdiction of the Army Transport Service (Tr. 16, 21). While engaged in a warlike operation, to-wit, the transportation of military cargo and military personnel from the Port of Seattle, the base of supply for military activities and operations in the Territory of Alaska, to war bases in Alaska (Tr. 22, 23, 24, 35, 36), the *Branch* stranded on Hammer Island, in the Inside Passage on January 13, 1942 (Tr. 27, 28).

There are two routes from the Port of Seattle to the intended ports of call, the "outside route" and the "Inside Passage" (Tr. 18). The outside route is through the Strait of Juan de Fuca, thence directly over the open ocean and Gulf of Alaska, and was the customary direct peacetime route (Tr. 20). The Inside Passage is through the channels formed by the islands lying along the coast of British Columbia and Alaska, thence through the Gulf of Alaska and is navigationally hazardous (Tr. 18, 19). To minimize the hazards of the Inside Passage reliable compasses and experienced officers, pilots and helmsmen are required (Tr. 20).

Prior to and during the voyage a state of war existed with the Empire of Japan (Tr. 22). To neutralize the effect of the steel hull of the *Branch* on magnetic mines, she was subjected to a deperming process which created an unstable condition of her compasses, causing them to "wander" and to be unreliable for maintaining a course, but because of the urgent military necessity, the voyage was nevertheless undertaken (Tr. 23, 24). The officers and pilot of the *Branch* were inexperienced and without adequate local knowledge of the conditions and hazards to be encountered on the Inside Passage and due to the war it was difficult to procure competent helmsmen and the helmsman

steering at the time of stranding was incompetent (Tr. 28, 29).

Prior to and during the voyage there was evidence of the presence of enemy submarines in the waters traversed by the outside route. Knowing that on such route she would have been openly exposed to hostile enemy action, and fearing her destruction or damage, the Navy Routing Officer directed the *Branch* to proceed by way of the Inside Passage, as a calculated risk, under a preconceived War Plan, the navigational risks of the Inside Passage being considered overbalanced by the menace of submarines on the outside route (Tr. 25). The *Branch* was likewise instructed to proceed at maximum full ahead speed, and was so operating at the time of her stranding (Tr. 26).

On approaching Hanmer Island the *Branch* was put on a proper and safe course in the channel to pass approximately 350 yards or more to the left of the island (Tr. 28). The pilot, noting that she had deviated to the right of her course, ordered "left", but the helmsman executed "right", whereupon the pilot ordered "hard left", but the helmsman executed "hard right", thus steering the *Branch* away from the safe channel and toward the island. The second mate, who had been directed to stand alongside the helmsman to watch his steering, took the wheel and executed "hard left". About a minute thereafter the island was observed near at hand and the engines ordered placed at full astern and almost immediately thereafter the *Branch* hit and stranded (Tr. 28).

The instability of the steering compass as a result of the depermíng may have been a contributing factor to the deviation from her course. The stranding would not have occurred, however, if the helmsman had been competent and had obeyed the directions of the pilot (Tr. 28, 29).

2. *The Charter.*

Petitioner sought to recover for the damage resulting from the stranding[1] by reason of the provisions of the charter party.[2]

By the charter, petitioner at its own expense was required to and did secure the usual American Time Hulls form of marine insurance containing the usual F. C. & S. clause, reading:

> "Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom" (Tr. 18).

By the charter, the United States assumed "all other risks, including war risk", and agreed:

> "in the event loss or damage shall occur from a risk assumed by Charterer, Charterer shall pay Owner for all such loss or damage suffered by Owner * * *." (Tr. 17).

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[1] Petitioner without prejudice to the question of liability under the charter was requested to and did incur and expend for repairs, salvage and general average, $372,470.07. The United States has paid on account of general average, $26,954.49, leaving a balance of $345,515.58 (Tr. 29).

[2] Also for charter hire of $60,085.57 recoverable under the charter if the stranding and resulting damage is "under any of the risks" assumed by the United States (Tr. 29, 30).

3. *The Issue and Decision.*

The Court of Claims having concluded as a matter of law from its special findings of fact that the *Branch* at the time of her stranding was engaged in a warlike operation, states the issue as follows:

> "The question is, was the damage a consequence of a warlike operation, and therefore not covered by the plaintiff's policy. If it was not, the Government must pay for the damage, since, as we have seen, it assumed 'all other risks, including war risk * * *'". (Tr. 33).

The issue is further stated:

> "Was the fact that the *Branch* was engaged, as we have concluded that she was, in a warlike operation, the legal cause of her stranding?" (Tr. 36)

It was concluded that the requisite causal relation was not present and that the stranding and resulting loss was not therefore a "consequence of a warlike operation" and the petition was dismissed (Tr. 40, 41, 43).

Question Presented

Was the stranding of the *Branch* while engaged in a warlike operation as an Army Transport under the circumstances here shown a consequence of hostilities or a warlike operation making the United States liable for the resulting damages and for charter hire under the provisions of the charter?

Reasons for Allowance of Writ of Certiorari

1. The decision of the Court of Claims is in direct conflict with the decision on a similar matter by the Court of

Appeals for the Ninth Circuit in *General Ins. Co. of America* v. *Link* (*The Roustabout*), 173 F. (2d) 955, decided April 9, 1949. See Rule 38-5-(b) of this Court.

2. The Court of Claims failed to observe the admonition of this Court as to keeping in harmony with the marine insurance laws of England, *Queen Ins. Co.* v. *Globe & Rutgers F. Ins. Co.* (*The Napoli*) (1924), 263 U. S. 487, 493, and failed to accord respect for established doctrines of English maritime law, *Aetna Ins. Co.* v. *United Fruit Co.* (1938), 304 U. S. 430, 438, by refusing to follow the decisions of the House of Lords in *Attorney-General* v. *Adelaide Steamship Company, Limited* (*The Warilda*) (1923), A. C. 292; *Board of Trade* v. *Hain Steamship Co. Ltd.* (*The Roanoke—The Trevanion*) (1929), A. C. 534; *Yorkshire Dale Steamship Company, Limited* v. *Minister of War Transport* (*The Coxwold*) (1942), A. C. 691.

3. The decision of the Court of Claims is in direct conflict with the English decisions above mentioned. Conflict with an English decision in the Court of Queen's Bench was the basis for a writ of certiorari in *Aetna Ins. Co.* v. *United Fruit Co.* (1938), 304 U. S. 430, 434. *A fortiori* here, where the decision is in conflict with decisions of the House of Lords.

4. The decision of the Court of Claims will affect the determination of similar questions in a large number of pending litigated cases and is of great importance in the field of marine insurance. See Petition for Writ of Certiorari, pp. 6, 7 in *Standard Oil Company of New Jersey, Petitioner*, v. *United States of America*, as Owner of the United States Ship YMS-12, pending in this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the said decision and judgment of the Court of Claims and that said judgment be

reversed and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Dated at Seattle, Washington, March 21, 1950.

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a Corporation,
By EDWARD G. DOBRIN,
STANLEY B. LONG,
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603 Central Building,
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Of Counsel.

BRIEF IN SUPPORT OF PETITION

Jurisdiction

The date of the judgment to be reviewed is January 3, 1950 (Tr. 43) and jurisdiction of this Court to review the same on certiorari is provided by Title 28 United States Code, § 1255(1). *Northwestern Shoshone Indians* v. *United States* (1945), 324 U. S. 335, 337.

Statement of the Case

A sufficient statement of the case is believed to have been given in the petition.

Specification of Errors

The Court of Claims erred in holding and finding that the stranding of the *Branch* while engaged in a warlike operation as an Army Transport under the circumstances here shown was not a consequence of hostilities or a warlike operation making the United States liable for the resulting damages and for charter hire under the provisions of the charter.

ARGUMENT

Reasons for Allowance of Writ of Certiorari.

1. The decision of the Court of Claims is in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *General Ins. Co. of America* v. *Link* (*The Roustabout*), 173 F. (2d) 955.[3]

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[3] There is likewise a conflict between this decision and that of the Court of Appeals for the Second Circuit in *United States* v. *Standard Oil Co. of New Jersey*, 178 F. (2d) 488 (1949). See Petition for Writ of Certiorari in *Standard Oil Company of New Jersey, Petitioner*, v. *United States of America*, as Owner of the United States Ship YMS-12, pending in this Court.

The Roustabout involved a mutual fault collision in the Inside Passage between the *Roustabout*, a small Navy Tanker of the United States, while engaged in a warlike operation, and the merchant vessel *Eastern Prince*, not so engaged. The *Eastern Prince* was damaged and was permitted recovery for such damage under a policy of insurance covering those risks excluded by the F. C. & S. clause of the ordinary marine policy.[4] It was pointed out that there was no controlling decision by this Court and in conformity with the admonition in *Queen Ins. Co.* v. *Globe & Rutgers F. Ins. Co.* (*The Napoli*) (1924), 263 U. S. 487, 493, the court applied the rule as announced by the House of Lords in *Attorney-General* v. *Adelaide Steamship Company, Limited* (*The Warilda*) (1923), A. C. 292, and *Board of Trade* v. *Hain Steamship Co. Ltd.* (*The Roanoke—The Trevanion*) (1929), A. C. 534.[5]

The Warilda involved a collision between the *Warilda*, a government chartered vessel operated as an Army Transport engaged in a warlike operation, and the *Petingoudet*, a merchant vessel not so engaged. The *Warilda* was found solely at fault. It was held that the resulting damage to the *Warilda* was recoverable under the charter as a consequence of the warlike operation, the risk of which was assumed by the government.

Viscount Cave L. C., stated:

> "It was said that the warlike operation of the *Warilda* was not the proximate cause of the collision, that the negligence of her master was a new factor intervening between the warlike operation and the col-

[4] The clause was identical to the clause here involved. For historical development of the clause, see *Liverpool and London War Risks Association, Limited* v. *Ocean Steamship Co. Limited* (*The Priam*), (1948) A.C. 243, 264.

[5] These were collision cases, but as will be later shown, the same rule applies to a stranding by a vessel engaged in a warlike operation.

lision, and that the collision was a consequence of that negligence and not of the warlike operation. * * *. By the terms of the charterparty, the Crown is liable for 'all consequences' of hostilities or warlike operations, nothing being said about their being skillfully or unskillfully conducted. * * *. The negligence of the master may have contributed to the loss; but its dominant and effective cause was the operation in which the vessel was engaged, and the liability therefor attaches" (p. 298).

Lord Shaw of Dunfermline stated:

"The conduct may have been faulty, but it was a warlike operation although faultily conducted. Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk. Once the category of warlike operations attaches to the movements of the vessel, that category must continue to attach, although those movements had an element of negligence in their operations" (p. 300).

The Roanoke—The Trevanion involved a mutual fault collision between the *Roanoke*, a United States Mine Planter engaged in a warlike operation, and the *Trevanion*, a government chartered merchant vessel not so engaged. It was held on authority of the *Warilda* that the resulting damage to the *Trevanion* was recoverable under the charter as a consequence of warlike operations, the risk of which was assumed by the government.

Lord Buckmaster, in referring to *The Warilda*, stated:

"This House has decided that, if a vessel is engaged on warlike operations and none the less by its negligence collides with another vessel, the negligence does

not prevent the collision from being the result of warlike operations * * * * * * the law upon this point is authoritative and clear. It follows, therefore, that the negligence of the *Roanoke* does not prevent this collision from being the result of warlike operations. Does then the negligence of the *Trevanion* produce that result? In my opinion it does not. I think the case of *Reischer v. Borwick*, (1894) 2 Q.B. 548, approved by this House in *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, (1918) A.C. 350, shows that it is no answer to a claim under a policy which covers one cause of a loss that the loss was also due to another cause that was not so covered." (pp. 538, 539) [6]

Reference is made in the *Roustabout* to the facts and decision in *The Napoli*, (1924) 263 U. S. 487, which involved a collision between two merchant vessels proceeding in convoys, neither of which was found to be engaged in a warlike operation. This Court on authority of the decision of the House of Lords in *Green* v. *British India Steam Navigation Co. Ltd.* (*The Matiana*), and *Britain Steamship Co. Ltd.* v. *The King* (*The Petersham*), (1921) 1 A.C. 99, involving collisions under similar circumstances where neither colliding vessel was engaged in a warlike operation, held in a suit on a cargo policy (without deciding which vessel was at fault) that damage to the cargo was not the consequence of warlike operations.

In the reference to *The Napoli* and another case, it was stated that "In neither of these cases was the proximate cause * * * the wrongful commands of naval officers directing the navigation of an armed naval vessel in a war service." This statement was presumably intended to disclose that no warlike operation was involved in the cases. The Court of Claims in reference to this statement says that

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[6] See *Orient Insurance Co.* v. *Adams*, (1887) 123 U. S. 67, 72, 73 and cases cited.

although the *Branch* was engaged in a warlike operation, "that operation did not answer the description just quoted and relied upon to distinguish the *General Insurance Co.* case from the *Queen Insurance Co.* case." (Tr. 38)

It is submitted that the *Branch*, being engaged in a warlike operation, it is immaterial whether those in charge of her navigation were in the naval or military service of the United States or civilian employees of the United States.

There is a clear conflict of decision between the Court of Claims and the Court of Appeals for the Ninth Circuit.

2. The Court of Claims failed to follow the controlling English decisions.

In *The Napoli*, (1924) 263 U. S. 487, 493, Mr. Justice Holmes, speaking for the Court, said:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * *."[7]

In *Aetna Ins. Co. United Fruit Co.*, (1938) 304 U. S. 430, 438, Mr. Justice Stone, speaking for the Court, stated:

> "We recognize that established doctrines of English maritime law are to be accorded respect here * * *."

See also *The Eliza Lines*, (1905) 199 U. S. 119, 128; *New York & Oriental S. S. Co.* v. *Automobile Ins. Co.*, 37 F. (2d) 461, 463 (C. A. 2, 1930); *The Galileo*, 54 F. (2d) 913, 915 (C. A. 2, 1931); *Aetna Ins. Co.* v. *Houston Oil & Transport Co.*, 49 F. (2d) 121, 124 (C. A. 5, 1931); *Aetna Ins. Co.* v. *United Fruit Co.*, 92 F. (2d) 576, 580 (C. A. 2, 1937); *Mellon* v. *Federal Ins. Co.*, 14 F. (2d) 997, 1004 (S.D. N.Y., 1926); *The Schodack*, 16 F. Supp. 218, 219 (S.D. N.Y., 1936); *Stofey* v. *United States*, 87 F. Supp. 81, 83 (M.D. Pa., 1949).

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[7] The marine insurance here involved was written in England (Exhibits 34, 35, 36, 39(1)(2), 40(1)(2), (Tr. 18)).

The Court of Claims quotes the admonition in *The Napoli* and states:

> "This statement is heavily relied upon by the plaintiff for reasons which will become apparent." (Tr. 38)

The Court of Claims then discusses the decisions of the House of Lords in *The Warilda, The Roanoke—The Trevanion*, and in *Yorkshire Dale Steamship Company, Limited* v. *Minister of War Transport* (*The Coxwold*), (1942) A.C. 691.

The Coxwold involved the stranding of the *Coxwold*, a merchant vessel chartered to the government, which stranded while engaged in and proceeding on a warlike operation. It was held that the resulting damage to the *Coxwold* was recoverable under the charter as a consequence of the warlike operation, the risk of which was assumed by the government.

The Court of Claims then states:

> "We think, then, that the present English interpretation of the insurance clause in question is that when a casualty occurs to a ship which is engaged in a warlike operation, as a result of any activity of the ship, the loss is a consequence of the warlike operation. The development of the English law towards this conclusion is traced by Lord Wright in his opinion in the case of the *Coxwold* * * *." (Tr. 40)

The decision of the House of Lords in *Liverpool and London War Risks Association, Limited* v. *Ocean Steam-Ship Co., Limited* (The Priam), (1948) A.C. 243, reaffirms the English rule. Lord Porter stated:

> "* * * when a ship is engaged in the warlike operation of proceeding with war stores from one war base to another a collision with another ship or a grounding which is the result of that operation is a war loss." (p. 266)

It is clear from the English authorities that the rule stated applies with equal force to a stranding as well as to a collision. *The Coxwold, Athel Line, Ltd.* v. *Liverpool and London War Risks Insurance Association, Ltd.*, (1946) K.B. 117.

On the authority of *The Warilda, The Roanoke—The Trevanion, The Coxwold, The Priam* and *the Roustabout* it follows, as a matter of law from the special findings of fact that the loss resulting from the stranding of the *Branch* while engaged in a warlike operation was a consequence of hostilities or a warlike operation, the risk of which was excluded by the F. C. & S. clause from the coverage of the marine policy and was accordingly a risk assumed in the charter by the United States. The error of the Court of Claims in failing so to decide is subject to correction by this Court on review. *United States* v. *Esnault-Pelterie*, (1938) 303 U. S. 26, 28, 29.

Despite the lack of controlling authority from this Court and despite the admonition announced by this Court in such matters, the Court of Claims by its decision has failed to follow the controlling decisions of the House of Lords. The basic reason appears to be its conclusion that the House of Lords in the cases mentioned has failed to give proper consideration to the causal relation between warlike operation and the resulting casualty, be it a collision or a stranding.

The test of causal relation as announced by this Court is identical with that applied by the House of Lords. In *Lanasa Fruit S.S. & I. Co.* v. *Universal Ins. Co.*, (1938) 302 U. S. 556, 562, 563, it is stated that in cases of marine insurance, "the promimate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result." This Court then quotes with approval from the judgment of Lord Shaw in *Leyland Shipping Co.* v. *Norwich*

Union Fire Insurance Society, (1918) A. C. 350, a decision of the House of Lords, as follows:

> "To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. * * *.
>
> "What does 'proximate' here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed."

In *The Coxwold,* (1942) A. C. 691, as well as in the prior English decisions, the matter of causal relation was exhaustively considered. Lord Wright stated that on the basis of prior decisions if the damage was caused by the action of the vessel in executing a warlike operation, it should be classed as a consequence of a warlike operation, and continued:

> "The material words of the clause are: 'Consequences of hostilities or warlike operations' * * *. * * *. 'Consequences' is a compendious description of the perils to be excepted (or included), not a description relating to the loss. As Willes J. said * * * 'The words "all consequences of hostilities" refer to the totality of causes, not their sequence.' * * *. Once it is clear, as this House finally held in Leyland Shipping Co. * * *, that 'proximate' here means,

not latest in time, but predominant in efficiency, there is necessarily involved a process of selection from among the co-operating causes to find what is the proximate cause in the particular case. In the words of Phillips on the Law of Insurance * * *: 'In case of the concurrence of different causes to one of which it is necessary (sc. because of the nature of the contract) to attribute the loss, it is to be attributed to the efficient predominating peril whether it is or is not in activity at the consummation of the disaster.' * * *. Cause here means what a business or seafaring man would take to be the cause without too microscopic analysis but on a broad view. * * *. The question always is what is *the* cause, not merely what is *a* cause. The cause so ascertained must then be within the description of 'consequences of warlike operations' if the shipowner is to recover. * * *. It seems that the clause was, in the first instance, deliberately phrased to cover all the possible varieties of war risk losses. The words are in one sense clear enough. They postulate (1.) loss or damage (2.) due to perils which can be described as consequences of hostilities, to which was later added warlike operations. That last is a wide term. It has been difficult to define its scope and apply it to all the variations and combinations of fact, but the difficulty of construction is no greater than has been experienced in the construction of other documents in other spheres. A contract can be changed if it does not work satisfactorily." (pp. 705, 706, 707)

Lord Porter in discussing the subject of proximate cause referred likewise to *Leyland Shipping Co.* for the proposition that "the proximate cause is not necessarily the nearest in point of time. It is the dominant cause" (p. 715), and stated that the warlike operation of the *Coxwold* consisted in "proceeding from one war base to another war base with military stores" and that "the question * * * resolves itself into an inquiry whether the loss was caused

by proceeding on that voyage" (p. 716). He then concludes:

> "Stranding, it is true, is normally a marine risk just as a collision is, but it may, nevertheless, be effectively caused by a warlike operation where that operation is the proceeding from one war base to another and the stranding takes place as a result of so proceeding. * * *
>
> "* * *.
>
> "* * *. I should be prepared to hold that almost any casualty befalling a vessel as a result of her own action in proceeding on a voyage, in a case where proceeding on that voyage was a warlike operation, was caused by a warlike operation * * *. I take the same view whether the misfortune was due to negligence or was accidental or inevitable * * *.
>
> "* * *.
>
> "* * * the cause of the *Coxwold* being at that place at that time in those conditions was her warlike operation, and the loss was, in my view, not only in the course of but caused by that operation." (pp. 718, 719, 720)

The Court of Claims although stating that it recognizes "that the problems of causation are not quite the same in negligence litigation and in the instant case" (Tr. 36) apparently predicates its conclusion on the determination of legal causation said to be involved in tort actions, and it is stated in the majority opinion that the "sailing the inside passage, the incompetent helmsman, and the wandering compass, were consequences of the war, but were not the consequences of the warlike operation of the plaintiff's ship" (Tr. 37). The concurring opinion, on the other hand, states:

> "It seems to me that the opinion of the majority overlooks the word 'hostilities'. I think it is clear

> that the *Branch* was in the Inland Passage in consequence of hostilities, and I think it is clear that it was 'depermed' in consequence of hostilities." (Tr. 42)

The writer of the concurring opinion, however, concludes that the stranding and resulting loss did not come about in consequence of hostilities or warlike operations, because due care was not exercised in the navigation of the vessel.

The majority opinion, although stating that under general legal principles there must be some causal relation between the warlike operation and the casualty before the casualty can be regarded as a consequence of the warlike operation, fails to follow the English rule. In the absence of doing so, the opinion fails to point out what circumstances would be considered sufficient to make the stranding of a vessel engaged in a warlike operation the consequence of hostilities or of the warlike operation. The concurring opinion at least indicates that there must be no negligence in connection with the navigation. In view of the special finding of fact that the instability of the steering compass may have been a contributing factor, but that the stranding would not have occurred if the helmsman had been competent and had obeyed the directions of the pilot (Tr. 28, 29), it must be assumed that the majority opinion was influenced by the same consideration.

That negligence is not an intervening cause has been settled by the House of Lords in *The Warilda, The Roanoke—The Trevanion, The Coxwold,* and *The Priam,* the language to which effect in *The Coxwold* is quoted by the majority opinion of the Court of Claims (Tr. 39, 40).

The suggestion by the Court of Claims, that under the decision in *The Coxwold,* which it refused to follow, the marine policy "did not protect anyone against any loss of a kind which, in fact, was likely to happen" (Tr. 41), is answered by Lord Wright in *The Priam,* (1948) A. C. 243, 258, 259, as follows:

> "If the true effect of the f.c. and s. clause is to exclude every sort of marine damage occurring while the ship was engaged on a warlike adventure then, as it seems to me, the marine policy is simply otiose during that adventure. But no one has gone so far as that. * * *. Outside of the particular concept of the 'warlike operation' or particular war risks the sea peril remains and must still be held to be the operative peril for which the marine underwriters continue to be liable, except in the case of collision, stranding or the like, due to the ship, a 'warlike operation' ship, being actively directed into the obstacle on her warlike course."

Finally, the Court of Claims rests its conclusion as to the proper interpretation of the F.C. & S. clause on the assumed intention of the parties, not supported by any of the special findings of fact, namely, "that the marine insurance should cover the risks which the ship would have been subject to if she had been operated by her owner for the owner's commercial purposes." (Tr. 41) The *Branch* of course was not so operated by her owner. A contract is to be construed according to the legal import of its terms, *Van Ness* v. *The Mayor*, (1830) 4 Pet. 232, 285, and the intent of the parties not expressed in the contract is ineffective, *Williston*, Contracts, Rev. Ed. Vol. Three § 610. Whatever the intention of the parties, it could not increase the coverage afforded by the marine insurance policy and thus lessen the obligations of the United States under the charter.

It is stated, without support from the special findings of fact, that if the *Branch* had been operated by the owner for commercial purposes, she would have been subject to the same risk of stranding (Tr. 41). If so, this appears immaterial. However, in any event, this statement overlooks the fact that under circumstances unaffected by military necessity, the *Branch* would not have normally proceeded in the Inside Passage, but would as she did on her prior voyage have proceeded on the customary outside

route (Tr. 20, 21, 22) and in normal circumstances would not have proceeded at all with her unreliable compasses (Tr. 24).

The Court of Claims erroneously refused to follow the decisions of the House of Lords pursuant to the conformity rule announced by this Court in *The Napoli*, (1924) 263 U. S. 487, 493, and in *Aetna Ins. Co.* v. *United Fruit Co.*, (1938) 304 U. S. 430, 438. The Court of Claims erred, in any event, in concluding that the stranding of the *Branch* was not the consequence of hostilities or a warlike operation the risk of which was assumed by the United States.

Conclusion

The question stated in the petition should be settled by this Court and a writ of certiorari to that end should issue.

Dated at Seattle, Washington, March 21, 1950.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1950

No. 710 37

LIBBY, McNEILL & LIBBY, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Opinion of the Court of Claims

The Special Findings of Fact and Opinion of the Court of Claims and Concurring Opinion (Tr. 15), is reported in 87 F. Supp. 866.

Jurisdiction

The date of the judgment to be reviewed is January 3, 1950 (Tr. 43), and jurisdiction of this Court to review the same on certiorari is provided by Title 28 United States Code, §1255(1). *Northwestern Shoshone Indians v. United States* (1945), 324 U. S. 335, 337. The petition for writ of certiorari was granted on June 5, 1950 (Tr. 44).

Statement of the Case

A sufficient statement of the case is believed to have been given in the petition (Pet. pp. 1-5).

Specification of Errors

The Court of Claims erred in holding and finding that the stranding of the *Branch,* while engaged in a warlike operation as an Army Transport under the circumstances here shown, was not a consequence of hostilities or a warlike operation making the United States liable for the resulting damages and for charter hire under the provisions of the charter.

ARGUMENT

The Court of Claims having concluded as a matter of law from its Special Findings of Fact that the *Branch* at the time of her stranding was engaged in a warlike operation (Tr. 35, 36) nevertheless held that such stranding was not a consequence of hostilities or a warlike operation (Tr. 40).

Therefore, the question presented to this Court is,—was the stranding of the *Branch,* while engaged in a warlike operation under the circumstances here shown, a consequence of hostilities or a warlike operation? An affirmative answer to this question would require the United States to pay the damage and charter hire for the recovery of which this action was instituted.[1]

In its Brief in Support of the Petition, petitioner has demonstrated and the decision of the Court of Claims concedes, that under English law the stranding of the *Branch* was a consequence of hostilities or a warlike operation and the petitioner entitled to the recovery sought (Tr. 40).[2]

The Court of Claims, however, refused to apply the English law as it should have done in response to the

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[1] Petition, pp. 4, 5.

[2] Brief in Support of Petition, p. 13.

admonition of this Court in *The Napoli* (*Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*) (1924), 263 U. S. 487, 493, and in *Aetna Ins. Co. v. United Fruit Co.* (1938), 304 U. S. 430, 438.[3]

Respondent's Position

In this Supplemental Brief we will discuss the position taken by Respondent that the judgment of the Court of Claims is "entirely correct, following and applying controlling decisions of this Court" in *The Napoli*, and *Morgan v. United States* (1872), 81 U. S. 531, 14 Wall. 531.[4] Respondent refers to *The Napoli* stating that in that case this Court "reaffirmed the rule, set forth as early as *Morgan v. United States*, 14 Wall. 531, that the distinction between marine insurance and war risk coverage was a problem of 'narrow construction' to be resolved by an inquiry into the 'cause nearest to the loss'."[5] Respondent, relying upon the statement in *The Napoli* last quoted, finally contends that the negligent navigation of the *Branch*, being the cause nearest the loss, is the proximate cause.[6]

As will be shown, Respondent's contentions are untenable since,—

(a) Under English decisions it is settled as a matter of law that the stranding (or collision) of a vessel engaged in a warlike operation, is proximately caused by and is a consequence of that warlike operation, when such casualty results from the activity or active direc-

[3] Brief in Support of Petition, p. 12.

[4] Brief of the United States in Opposition, Nos. 663 and 664, p. 7.

[5] Brief of the United States in Opposition, Nos. 663 and 664, p. 7.

[6] Brief of the United States in Opposition, Nos. 663 and 664, p. 8.

tion (whether negligent or not) of the vessel in proceeding on and carrying out the warlike operation.

(b) In *The Napoli,* neither vessel was engaged in a warlike operation, whereas the *Branch* was conclusively found to be so engaged (Tr. 35, 36.)

(c) *Morgan v. United States* and similar cases involved entirely different contractual charter provisions employing the term "war risk," held to mean only "acts of the public enemy."

(d) The test of causal relation and the rule of "proximate cause" as announced and applied by this Court is identical with that announced and applied by the House of Lords.[7]

(e) Negligence in the navigation of a vessel engaged in a warlike operation is immaterial in determining proximate cause.[8]

American Civil War Cases

Before discussing *The Napoli* it is appropriate to first refer to the earlier American decisions, including *Morgan v. United States* (1871), 14 Wall. 531, which arose under certain Governmental charters in use during the Civil and Spanish-American wars. By the terms of those charters the owners assumed the "marine risk" and the Government assumed the "war risk." The charters contained no exceptive warranty comparable to the F. C. & S. clause. Indeed, during that period the then current F. C. & S. warranty did not contain the terms "consequences of hostilities or warlike operations." The insertion of those terms in the marine policies was a subsequent development in the growth of the war-

[7] Brief in Support of Petition, pp. 14, 15.

[8] Brief in Support of Petition, p. 18.

ranty and did not occur until 1898.[9] Thus, during that period a collision or stranding as a consequence of hostilities or warlike operations, as those terms are now understood, was nonetheless a marine risk within the coverage of the marine policy. Loss or damage as a "consequence of hostilities or warlike operations" was not excepted from the general marine risk coverage. Hence, it was then sufficient to determine only that the loss was occasioned by stranding, collision or other peril of the seas.[10]

A modern marine insurance policy containing an F. C. & S. warranty including the terms "consequences of hostilities or warlike operations" is a different contract and therefore presents an entirely different coverage.[11] "The relevant contrast is not, strictly speaking, between marine and war risks. * * * the question here is

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[9] For the history and growth of the F. C. & S. warranty see: *Arnould on Marine Insurance and Average*, 12th edition, Vol. 1, § 10, pp. 18, 19, and Vol. II, §§ 903-905(f), pp. 1204-1219; *The Petersham* (*Britain S. S. Co. v. The King*), (1919) 2 K. B. 679 at 692; *The Priam* (*Liverpool and London War Risk Ins. Assn. v. Ocean S. S. Co. Ltd.*), (1948) A. C. 243; *Ionides v. Universal Marine Insurance Co.* (1863), 14 C. B. (N. S.) 259.

[10] The difference in effect between an express exception from a risk undertaken and general coverage not containing an excepted risk was considered in *Howard Ins. Co. v. Norwich & N. Y. Trans. Co.* (1871), 12 Wall. 194, and in *Aetna Ins. Co. v. Boon* (1877), 95 U. S. 117.

[11] The coverage provided by a marine policy with an F. C. & S. clause is illustrated in *Leyland Shipping Co. v. Norwich Union Fire Ins. Society*, (1918) A. C. 350, by the House of Lords:

LORD DUNEDIN: " * * * The policy, in time-honoured form, first specified as the perils and adventures which the underwriters are content to bear, perils of the sea in general terms; and then comes a detailed enumeration of certain perils. *Now when the f. c. s. clause is added certain enumerated perils are cut out of the original insurance.* * * * ".

VISCOUNT HALDANE: " * * * The insurance included among the perils which it covered those of the seas, but from these were expressly excluded all consequences of hostilities or warlike operations."

not whether this is a marine risk, but whether, granting that stranding is a marine risk, this stranding is not to be regarded as 'the consequences of warlike operations'." [12].

An examination of these early American decisions [13] reveals them to be of little or no authoritative value in determining the question here involved. Since these decisions were concerned with the definition of the limited term "war risk" they obviously do not establish a rule contrary to the decisions of the House of Lords in *The Warlida, The Trevanion-Roanoke, The Coxwold,* and *The Priam* [14] construing the F. C. & S. clause.

The meaning of the term "war risk" was first considered in *Bogert v. United States* (1866), 2 Ct. Cl. 159, in which the Court said at page 163:

> "* * * I do not find that *this general term 'war risk' has ever been employed in a policy of insurance, or* if so employed, that it *has ever received a judicial interpretation. As employed* in this con-

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[12] *The Coxwold* (*Yorkshire Dale S. S. Co. Ltd. v. Minister of War Transport*), (1942) A. C. 691, at p. 697.

[13] *Bogert v. United States* (1866), 2 Ct. Cl. 159; *Baker v. United States* (1867), 3 Ct. Cl. 76; *Morgan v. United States* (1872), 81 U. S. 531, 14 Wall. 531, Aff. 5 Ct. Cl. 182; *Reybold v. United States* (1872), 82 U. S. 202, 15 Wall. 202, Aff. 5 Ct. Cl. 277; *White v. United States* (1880), 154 U. S. 661, Aff. 11 Ct. Cl. 578; *Mott v. United States* (1873), 9 Ct. Cl. 257; *Leary v. United States* (1872), 81 U. S. 607, Aff. 5 Ct. Cl. 234; *Talbot v. United States* (1872), 7 Ct. Cl. 417; *Field v. United States* (1876), 12 Ct. Cl. 355; *Goodwin v. United States* (1873), 84 U. S. 515, 17 Wall. 515, Aff. 6 Ct. Cl. 146. Of similar import to Civil War cases but arising out of the Spanish-American War is the case of *Donald v. United States* (1904), 34 Ct. Cl. 357.

[14] *The Priam* (*Liverpool and London War Risk Ins. Assn. v. Ocean S. S. Co. Ltd.*) (1948) A. C. 243; *The Warilda* (*Adelaide S. S. Co. v. The Crown*) (1923) A. C. 292; *The Trevanion-Roanoke* (*Board of Trade v. Hain S. S. Co.*) (1929) A. C. 534; *The Coxwold* (*Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport*) (1942) A. C. 691.

tract we think that *it cannot be extended so as to mean more than 'acts of the public enemy'; or, at the utmost, the casualties of war;* and we think that it was never intended that the government should be placed on the same footing with the public enemy, or become an insurer against its own acts." (emphasis supplied).

In *Morgan v. United States* (1869), 5 Ct. Cl. 182, the vessel under a Civil War time charter transporting troops and military stores, was ordered by military authorities over her master's objections, to put to sea under unfavorable weather conditions, with the result that she struck the bar at low water, sustaining damage. The Court said (pp. 189, 190):

> "1st. We are to inquire whether the damage to this vessel was the result of a 'war risk' assumed in the charter-party by the United States. *The term 'war risk' is an unusual one.* I do not find it in the works on insurance or adjudged cases. In the case of *Bogert v. The United States,* (2 Ct. Cls., 159), this court held that the terms in a policy in which the United States were the insurers could not be extended beyond the 'acts of the public enemy' or 'the casualties of war;' and that by its use the United States did not insure against their own acts. * * * *To bring it within such a war risk* as is assumed in this contract, *the damage must have resulted directly or proximately at least, from some act or operations of the public enemy.* Nothing of the kind exists here, and no obligation rests upon the United States growing out of that clause in the charter-party." (emphasis supplied).

Compare: *Baker v. United States* (1867), 3 Ct. Cl. 76.

In the *Morgan* case and other similar cases [15] it was only necessary for the Court to determine under which

[15] See f. n. 13.

of two classes of defined perils the loss fell, i.e., "marine risk" (perils of the sea), on the one hand, or "war risk" (acts of the public enemy), on the other. The charters in those cases contained no exceptive warranty comparable to the F. C. & S. clause which would remove a loss in the nature of a marine risk, such as stranding or collision, from the marine risk coverage.[16]

The Napoli

Respondent contends that this case falls "squarely within the rule announced and the decision made by this Court in *The Napoli*" [17] which involved a collision between two merchant vessels sailing in convoy with screened lights. Such a contention completely disregards the fundamental factual difference between *The Napoli* and the *Branch*. In *The Napoli* neither vessel was found to have been engaged in a warlike opera-

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[16] This distinction is made clear in *The Coxwold*:

LORD PORTER: " * * * Stranding, it is true, is normally a marine risk just as a collision is, but it may nevertheless be effectively caused by a warlike operation where that operation is the proceeding from one war base to another and the stranding takes place as a result of so proceeding."

LORD MACMILLAN: "A stranding of a ship is a typical marine casualty but that does not prevent it from being proximately caused by warlike operations."

LORD WRIGHT: "The stranding in this case was undoubtedly a peril of the seas, but we must look behind the stranding in order to ascertain if the cause of the stranding was a peril which could be described as a consequence of warlike operations."

[17] In *General Insurance Co. v. Link* (1949—C. A. 9), 173 F. (2d) 955, it was pointed out that there is no controlling decision of this Court on the issue presented, and in conformity with the admonition in *The Napoli* the Court applied the rule as announced by the House of Lords in *The Warilda* and *The Trevanion-Roanoke*. Brief in Support of Petition, p. 9.

tion [18] whereas the *Branch* was conclusively found to be so engaged (Tr. 35, 36). In *The Napoli*, Mr. Justice Holmes announced as the guiding principle of his decision, —

> "* * * There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business * * * ".[19]

In conformity with that principle, Justice Holmes expressly followed the decisions of the House of Lords in the companion cases of *The Petersham*, (*Britain S. S. Co. v. The King*), and *The Matiana*, (*British India Steam Nav. Co. Ltd. v. Green*) (1921) 1 A. C. 99, which held that,—" * * * In the case of a ship proceeding on a voyage which is not itself a warlike operation, absence of lights, sailing in convoy, and zigzagging are not separately or in combination a warlike operation, nor indeed is it a warlike operation to follow the course set by the naval officer in charge of the convoy. *The Petersham* and *The Matiana* * * * (1921) 1 A. C. 99." [20] On the authority of *The Petersham* and *The Matiana*, the *Napoli* was held not to be engaged in a warlike operation. Having reached that conclusion it would not seem that any discussion of causation was important or necessary to the decision. Nonetheless, Mr. Justice Holmes stated:

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[18] In *United States v. Standard Oil Co. of New Jersey* (1949—C. A. 2), 178 F. (2d) 488, at 490, Judge Clarke in referring to *The Napoli* said: "The *Napoli* collided with another ship while both were sailing without lights and under convoy. Even though it carried some war materials it was held not to be engaged in a warlike operation and thus the loss was not a war risk."

[19] Brief in Support of Petition, p. 12.

[20] *The Coxwold*—Lord Porter's Summation of the holding in *The Petersham* and *The Matiana*, distinguishing those cases from *The Coxwold*.

"* * * we are not to take broad views, but *generally* are to stop our inquiries with the cause nearest to the loss."

Respondent contends that that statement lays down an inexorable "controlling principle" or rule of proximate cause to be applied in this case.[21] We cannot agree.

The decisions of this Court in *Aetna Ins. Co. v. Boon* (1877), 95 U. S. 117, *The Llama, (Standard Oil Co. v. United States)* (1923), 267 U. S. 76, and *The Smaragd, (Lanasa Fruit S. S. & Importing Co. v. Universal Ins. Co.)* (1938), 302 U. S. 556, are contrary to Respondent's contention.

We submit that having found that *The Napoli* was not engaged in a warlike operation (following English decisions), Justice Holmes concluded that the collision, the cause nearest the loss, was also the cause predominant in efficiency, and therefore the proximate cause. For in the next case which Justice Holmes had occasion to consider, involving the rule of proximate cause, applied to a marine insurance loss, namely, *The Llama, (Standard Oil Co. v. United States)* (1923), 267 U. S. 76, Justice Holmes clearly recognized that the proximate cause is the dominant and efficient cause, — not necessarily the cause nearest in time to the loss.

In that case the insured vessel, *The Llama,* had been seized by British officers two days prior to the stranding which occasioned the loss. The Government as the war risk underwriter, relying on *The Napoli* and *Morgan v. United States,* contended that the stranding, a

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[21] Brief of United States in Opposition, Nos. 663 and 664, p. 8.

marine peril, was the cause nearest in time to the loss and therefore the proximate cause.[22]

In reversing the Court of Appeals which had found the stranding to be the proximate cause of the loss of *The Llama,* Justice Holmes, speaking for the Court, and fixing liability on the Government, said:

> "In defense it is argued that the proximate cause was a marine peril not covered by the policies, and that the decision should be governed by *Morgan v. United States,* 14 Wall. 531, 20 L. Ed. 738; *Queen Ins. Co. v. Globe & R. F. Ins. Co.,* 263 U. S. 487, 68 L. Ed. 402; and other similar cases. But in those very strict applications of a well-known rule, however strong the motives of the insured or owners for acting as they did, the loss ensued upon their own conduct. But if a vessel should be taken from an owner's hands without his consent, and should be lost while thus held by a paramount power, obviously a company that had insured against such a taking could not look beyond, and attribute the loss to a peril of the sea. Whatever happens while the taking insured against continues fairly may be attributed to the taking. That is a non-conductor between the insured and subsequent events."

Thus the stranding, ordinarily a marine peril, was the cause nearest the loss but not the proximate cause determining the Government's liability as the war risk underwriter.

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[22] In its Brief in *The Llama,* the Government stated: "In cases where a marine peril is a cause immediately preceding or next (proximate) to the disaster (or is the last in the series of causes or chains of causation), the proximate cause is the sea peril," citing,

"Queen Ins. Co. v. Globe & R. F. Ins. Co. supra; Morgan v. United States, 14 Wall. 531; Leary v. United States, 14 Wall. 607; Reybold v. United States, 15 Wall. 202; Donald v. United States, 39 Ct. Cl. 357; * * * ".

It cannot be assumed that in deciding *The Napoli* Justice Holmes overlooked the important prior decision of this Court in *Aetna Ins. Co. v. Boon* (1877), 95 U. S. 117, in which the rule of proximate cause was fully considered. That case involved a policy of fire insurance issued during the Civil War, covering premises in the City of Glasgow against fire risks, with the exceptive warranty—" * * * that the Company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, * * * or of any military or usurped power, * * *".

The City was surrounded and attacked by shelling *which caused no fire.* The commander of the defense forces, to prevent military supplies from falling into the possession of the rebel forces, ordered the supplies destroyed, by setting fire to the City Hall. The fire spread through two intermediate buildings to the store housing the goods insured under the defendant's policy. The goods were destroyed by fire. On the question of proximate cause this Court stated:

> "In view of this state of facts found by the court, the inquiry is, whether the rebel invasion or the usurping military force or power was the predominating and operative cause of the fire. *The question is not what cause was nearest in time or place to the catastrophe.* That is not the meaning of the maxim 'cause proxima, non remota spectatur.'
>
> "*The proximate cause is the efficient cause,* the one that necessarily sets the other causes in operation. *The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes* and the responsible ones, *though they may be nearer in time to the re-*

sult. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule. * * *

"* * * Applying it (doctrine of causation) to the facts found in the present case, the conclusion is inevitable, that the fire which caused the destruction of plaintiffs' property happened or took place, not merely in consequence of but by means of the rebel invasion and military or usurped power. The fire occurred while the attack was in progress, and when it was about being successful. *The attack, as a cause, never ceased to operate until the loss was complete. It was the causa causans which set in operation every agency that contributed to the destruction.*

"* * *

"The *proximate cause,* as we have seen, *is the dominant cause,* not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. * * * Hence it must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion or military or usurped power, and that it was excepted from the risk undertaken by the insurers." (emphasis supplied.)

In *The Smaragd, (Lanasa Fruit S. S. & Importing Co. v. Universal Ins. Co.)* (1938), 302 U. S. 556, this Court, reversing the decision of the Court of Appeals,[23] again reaffirmed the rule that the proximate cause is the efficient cause and not the cause nearest in time. In this case petitioner was the owner of a cargo of bananas

[23] (C. A. 4—1937) 89 F. (2d) 549.

covered by marine insurance. The bananas were loaded aboard the steamer *Smaragd,* which stranded, and before the vessel could be floated the bananas became overripe and decayed. The general coverage clause of the policy insured the bananas against loss or damage by "perils of the sea." It was assumed by the Court that the bananas were shipped in sound condition and that they would have been delivered in a merchantable condition, (despite their perishable nature), if the delay occasioned by the stranding had not occurred. This Court held that the proximate cause of the loss of the bananas was the stranding of the vessel although the cause last in time and nearest to the loss was decay and inherent vice. In so holding this Court said:

> "The *sole question is whether* in these circumstances *the stranding should be regarded as the proximate cause of the loss. Respondent contends that decay or inherent vice was the proximate cause.* It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, *the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result. Aetna F. Ins. Co. v. Boon,* 95 U. S. 117, 130, 24 L. Ed. 395, 398; Arnould, Marine Ins. 11th ed. 783.
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> "The subject was discussed in an illuminating way by Lord Shaw in his judgment in *Leyland Shipping Co. v. Norwich Union F. Ins. Soc.* (1918) A. C. 350, 368-371 — H. L. He said:
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> " 'To treat proxima causa as the cause which is nearest in time is out of the question. Causes are

spoken of as if they were as distinct from one another as beads in a row or links in a chain, but — if this metaphysical topic has to be referred to — it is not wholly so. This chain of causation is a handy expression, but the figure is inadequate. *Causation is not a chain, but a net.* At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

"'What does "*proximate*" here mean? To treat *proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency.* The efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.'

"There, in a policy insuring a ship, *there was a warranty of exception in case of hostilities or warlike operations, and the question was whether the loss of the vessel fell within the exception.* The vessel was torpedoed and sustained severe injuries but succeeded in making the outer harbor of the port of Havre. Notwithstanding all efforts by pumping and otherwise, she bumped, broke her back, and sank. It was *contended* that *she perished by a peril* of the sea because sea water entered the gash in her side which the torpedo made. *The entry of the*

sea water was indeed a peril of the sea and was proximate in time to the sinking. But as '*proximate cause is an expression referring to the efficiency as an operating factor upon the result*' it was held that 'the real efficient cause' of the sinking of the vessel was that she was torpedoed and hence that the loss was within the exception." (emphasis supplied.)

It is of special interest to note that in *The Smaragd* the Court of Appeals, in holding that the proximate cause was the last cause, relied upon Lord Esher's decision in *Taylor v. Dunbar,* L. R. 4 C. P. 206, and *Pink v. Fleming,* L. R. 25 Q. B. Div. 396. Reversing the Court below and referring to the decisions of Lord Esher, this Court said (pp. 567, 568):

"It seems that neither of these cases went to the House of Lords, and we find it impossible to reconcile Lord Esher's ruling — 'that according to the English law of marine insurance only the last cause can be regarded' — with the elaborate exposition of the doctrine of proximate cause which has been given by the House of Lords in *Leyland Shipping Co. v. Norwich Union F. Ins. Soc.* (1918), A. C. 350 — H. L., supra, from which we have quoted. And it is recognized in England that — 'Passages in Lord Esher's judgment in *Pink v. Fleming* * * * to the effect that only the cause last in time can be looked to, cannot now be supported.' Arnould, Marine Ins. 11 ed. § 783, note (r). * * * There is no statute applicable here which so restricts the doctrine of proximate cause, as we understand it and as it is set forth in the *Leyland Shipping Co. Case,* and the weight of American authority is contrary to the doctrine of *Pink v. Fleming.*"

It will be observed that in *The Smaragd*, this Court not only approved and followed English law on principles of "proximate cause" as applied in marine insurance, but adopted the language from *Leyland Steamship Co. Ltd. v. Norwich Union Fire Ins. Soc.* (1918) A. C. 350, the leading case in the House of Lords on "proximate cause", approved in *The Warilda* (1923) and recently reaffirmed and applied in *The Coxwold* (1942) and *The Priam* (1948).

We submit that it may now be concluded without reservation that the American and English decisions are in complete harmony and accord in the definition and application of the true rule of "proximate cause", being that cause, not nearest in time, but predominant in efficiency.[24]

The application of this rule of proximate cause resulted in the conclusions reached by the House of Lords in *The Warilda, The Trevanion-Roanoke, The Coxwold, The Priam, Ardgantock-Richard de Larrinaga,*[25] *The Atheltemplar,*[26] *The Geelong-Bonvilston,*[27] and by American courts in *The Eastern Prince-Roustabout* [28] and *The John Worthington-YMS-12* [29] which conclusions

[24] Brief in Support of Petition, pp. 14, 15.

[25] (1921) A. C. 141.

[26] (1946) K. B. 117 (approved in *The Priam.*)

[27] (1923) A. C. 191.

[28] *General Ins. Co. v. Link* (1949—C. A. 9), 173 F. (2d) 955. Aff. 77 F. Supp. 977, 56 F. Supp. 275 (D. C. Wn.).

[29] *United States v. Standard Oil Company of New Jersey* (1948—S.D.N.Y., Adm. Div.), 81 F. Supp. 183.

the Court of Claims recognized but erroneously failed to apply (Tr. 39, 40).[30]

Negligent Navigation Is Immaterial

Such failure was apparently influenced by the contributing negligence of the helmsman, one of the several causative factors in the stranding of the *Branch* and which the Court of Claims seemed to view as an intervening or the proximate cause, applying the test of causation said to be involved in tort actions (Tr. 40).

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[30] Brief in Support of Petition, p. 13.

In *The Coxwold*, Lord Porter summarized the prior decisions of the House as follows:

"(1) In this as in every other insurance problem the *proximate cause is alone to be looked at. Ionides v. Universal Marine Insurance Company* (supra). (2) But the proximate cause is not necessarily the nearest in point of time; it is the dominant cause. *Leyland Steamship Company, Limited v. Norwich Union Fire Insurance Society* (1918) A. C. 350; *Samuel v. Dumas* (1924) A. C. 431). In the case of a ship proceeding on a voyage which is not itself a warlike operation, absence of lights, sailing in convoy, and zigzagging are not separately or ~~in combination~~ a warlike operation, nor indeed is it a warlike operation to follow the course set by the naval officer in charge of the convoy. *The Petersham* and *The Matiana* (1921) 1 A. C. 99. (4) The dimming or extinguishing of a shore light is a warlike operation, but if a ship engaged in a mercantile operation goes ashore because she is out of her reckoning, she is not lost by the warlike operation merely because she would most probably have realized and avoided the danger had the light been seen. *Ionides v. Universal Marine Insurance Company* (supra). (5) A ship carrying war stores from one war base to another is engaged on a warlike operation. *The Geelong* (1923) A. C. 191. (6) A collision caused by a ship so engaged is caused by the warlike operation. *Attorney-General v. Ard Coasters* (1921) 2 A. C. 141. (7) A collision solely caused by a ship engaged on a mercantile adventure is not caused by a warlike operation even though that ship collides with or is struck by one engaged on a warlike operation. *The Clan Matheson* (1929) A. C. 514. (8) If the collision be caused both by the ship so engaged and by one not so engaged so that both were effective causes of the disaster the consequent loss is due to the warlike operation. *Board of Trade v. Hain Steamship Company* (1929) A. C. 534. (9) The collision if due in whole or in part to the action of the ship engaged in a warlike operation does not cease to be caused by the warlike operation by reason of the fact that that action is negligent. *The Wariida* (1923) A. C. 292."

Respondent similarly contends that —"the stranding resulted from the completely incompetent seamanship of those on board in swinging out of, instead of into, the safe channel."[31]

By "resulted" we assume is meant that such "negligence" was the proximate cause of the stranding.

The view taken by the Court of Claims and contended for by Respondent is directly contrary to the English authorities and was expressly overruled in *The Warilda,* and in *The Trevanion-Roanoke,* the holdings of which were reaffirmed in *The Coxwold*[32] and *The Priam*[33] and followed in *The Eastern Prince-Roustabout* (C. A. 9)[34] (Tr. 39, 40).[35]

It is well settled by the decisions of this Court that insurance against a specified peril is not affected by the co-operation or contribution of another cause, or by negligence contributing to a loss covered by such specified peril. *Insurance Co. v. Adams* (1887), 123 U. S. 67, 72, 73; *Insurance Co. v. Transportation Co.* (1870), 12 Wall. 194; *General Ins. Co. v. Sherwood* (1852), 14 How. 361, 365; *Columbia Ins. Co. v. Lawrence* (1836), 10 Pet. 509.

English decisions are in accord,—*Reischer v. Borwick* (1894), 2 Q. B. 548; *Leyland Shipping Co. v. Norwich Union F. Ins. Soc.* (1918) A. C. 350; *The Warilda; Arnould on Marine Insurance and Average* (12th Ed.), Vol. II, §§ 798-799, pp. 1059-1063.

The negative effect of negligence as a causative factor in a casualty befalling a ship engaged in carrying out and proceeding on a warlike operation was well stated in *The Warilda* by Lord Sumner, who said:

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[31] Brief of the United States in Opposition, p. 8.
[32] (1942) A. C. at p. 701.
[33] (1948) A. C. at pp. 255, 256, 269.
[34] 173 F. (2d) 955, at p. 957.
[35] Brief in Support of Petition, pp. 9, 10, 11, 18.

> "*Negligence is a quality of the navigation* as carried out, when two ships run into one another, *but is not a distinct operation in itself.* Whether the navigating officer keeps his course, when he should have given way, or gives way when he should have kept his course, what proximately causes the damage is the forcible impact of the two vessels; and it has long been settled that, under an ordinary policy against marine risk, an assured can recover for a loss by collision notwithstanding that the collision was solely brought about by the negligence of his employees, the captain or crew. I cannot see any valid ground for deciding otherwise, where the collision is part of a warlike operation badly conducted by those in charge of the ship which is engaged in such an operation." (Emphasis supplied.)

And by Lord Wrenbury:

> "The operation in progress was the navigation of the ship; that operation was a warlike operation, and nonetheless because the operation was negligently conducted. The loss was occasioned by a warlike operation negligently performed. The Admiralty had insured against the consequences of warlike operations, however they might happen, including, therefore, negligence. The negligence did not alter the character of the operation, and the loss was a consequence of the warlike operation which still remained the causa proxima."

At this point a further analysis of *The Napoli,* so strongly relied upon by Respondent, is appropriate. In that case both the District Court and the Court of Appeals dealt with the issue of negligence in the navigation of the vessels involved. Justice Holmes, however, stated:

> "As our judgment is based on *broader grounds,* we do not describe the movements bearing upon the nice question whether the navigation of the *Napoli* or the *Lamington* was in fault." (Emphasis supplied.)

Following *The Petersham* and *The Matiana,* the "broader grounds" forming the basis of the decision in *The Napoli,* was that neither vessel was engaged in a warlike operation. Therefore, as Justice Holmes pointed out, it was unnecessary to consider the effect of negligent navigation. If under different facts Justice Holmes had found *The Napoli* to be engaged in a warlike operation as was found in *The Warilda* (cited to the Court) we submit that there can be no doubt but that Justice Holmes in consequence of his own admonition, would have applied the rule of *The Warilda* respecting the immateriality of negligent navigation as a causative factor.[36]

In determining "proximate cause" in this case the inquiry is whether the damage was caused by the *definite action of the vessel* (*Branch*) *in proceeding* on her warlike voyage in carrying out the warlike operation. While proceeding between one war base and another (the starting and finishing points of the voyage) the voyage was a warlike operation throughout. Thus as was the whole voyage, so were its parts in which *the vessel was an active participant.* Stranding caused by the act of proceeding on the voyage was one of those parts, and nonetheless whether due to error in judgment or negligent navigation, and the damage occasioned thereby, was proximately caused by the "warlike operation."[37]

The English decisions have not held that every loss which occurs while a ship is engaged in a warlike operation is a consequence of that operation as the Court of Claims erroneously concluded (Tr. 40). The distinc-

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[36] Brief in Support of Petition, pp. 9, 10, 11, 18.

[37] *The Coxwold, The Warilda, The Priam, The Atheltemplar, The Eastern Prince-Roustabout.*

tion is made clear in *The Priam* (pp. 258, 259) [38] and in *The Clan Matheson* (*Clan Line Steamers, Ltd. v. Board of Trade*) (1929), A. C. 514.

In *The Priam*, Lord Porter said:

"As Lord Wright pointed out in *The Coxwold*, supra, *the basis of the decisions* seems to be that

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[38] Brief in Support of Petition, pp. 18, 19.

In *The Priam* it was said :

LORD WRIGHT: " * * * Outside of the particular concept of the 'warlike operation' or particular war risks the sea peril remains and must still be held to be the operative peril for which the marine underwriters continue to be liable, except in the case of collision, stranding or the like, due to the ship, a 'warlike operation' being actively directed into the obstacle on her warlike course. * * * ."

And in referring to Lord Atkins' opinion in *The Coxwold*, Lord Wright further stated:

"If I may revert to what Lord Atkin said, two things may be particularly noted. One was that he excluded definitely the idea that all casualties occurring to a vessel engaged on a warlike operation could be regarded as the consequences of the warlike operation; he said *almost* all. Secondly, he treated the essential distinction as being whether the course of the vessel is *directed* against another vessel or against a rock. * * * ."

LORD NORMAND: "When two ships, one of them being engaged in warlike operations, collide, the collision is the cause of the damage suffered by both ships, and if the collision is occasioned by the acts or omissions (whether negligent or not) of those in charge of the vessel which is engaged on warlike operations, the loss will be borne by war risk underwriters. * * * In the stranding cases, since the rock, or the shoal, or the bottom of the sea are merely passive and inert, there is in the normal case little difficulty in coming to the conclusion that those in charge of the ship by their acts or omissions, negligent or not, caused the damage. * * *

"If the damage was not caused by the conduct of those in charge of the *Priam* in prosecuting the warlike operation in which she was engaged * * * , there is left no ground for holding it to be a war risk loss. * * * As for loss caused by wind and wave, though there is no decision, there are to be found in *The Coxwold* (supra), opinions which would exclude it from the category of war-risk loss, though it is suffered by a ship while engaged in warlike operations. * * * These opinions were expressed in a case in which the decision of this House attributed the damage to the action of the ship's officers in so directing her course as to drive her on to the rocks, and it was immaterial to inquire whether there was negligence or fault on the part of those officers. * * * ."

the casualty can be traced to definite action on the part of those on board the quasi-warship *in directing the course of the vessel to carry out the warlike operation.* That direction may take her into collision with another vessel or onto a rock, but incidents may occur in the course of the voyage without being *caused by such definite action on the part of those directing it.* In the case of stranding or collision the progress of the ship brings her onto the rock or into the other vessel. The rock does not move; it is static." (Emphasis supplied.)

And in *The Coxwold,* Lord Atkin said:

"* * * if in the course of a warlike operation the direction of the ship's course against another ship is a consequence of a warlike operation, *Attorney-General v. Ard Coasters,* (37 The Times L. R. 692; (1921) 2 A C 141, *it is surely impossible to distinguish the case where the course of the ship is directed against a rock, and this whether negligently or without negligence, and whether the ship is deflected by tide, or current or wind.* * * *." (Emphasis supplied.)

Thus the *Branch* in the course of her warlike operation, having been *actively directed* to the stranding on her warlike course, the proximate and efficient cause of her stranding was the warlike operation on which she was then engaged and this, irrespective of the fact that the negligence of her helmsman contributed to the stranding.[39]

These principles were well settled prior to the time the *Branch* charter was entered into and prior to the issuance in England of the marine policy covering the *Branch,* of which the F. C. & S. warranty is a part. (Tr. 18.)

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[39] *The Warilda, The Coxwold, The Priam, The Altheltemplar, The Eastern Prince-Roustabout.*

The British Insurance Publication *"Fairplay"* in its issue for June 2, 1949, reported a paper read to the Institute of London Underwriters by Mr. Archie M. Stevenson, of the New York Bar, and formerly Insurance Counsel for the United States War Shipping Administration, as follows:

> "Mr. Stevenson opened with a brief review of the problems which American interests had to face in determining exactly what their F. C. and S. and War Risk Clauses meant. Even before the beginning of World War II the meaning of 'consequences of hostilities and warlike operations' had been determined in the English Courts, so that English underwriters knew what they were covering. Although the *Coxwold* case was not decided until the Spring of 1942, Mr. Stevenson considered that it did not establish any new principle, but merely followed the decision of the *Geelong-Bonvilston* and other cases."

It is clear that the Court of Claims erroneously refused to follow the decisions of the House of Lords pursuant to the conformity rule announced by this Court in *The Napoli* (1924), 263 U. S. 487, 493, and in *Aetna Ins. Co. v. United Fruit Co.* (1930), 304 U. S. 430, 438, there being no American rule contrary to the rule announced by the English authorities. The Court of Claims, in any event, erred in concluding that the stranding of the *Branch* was not the consequence of hostilities or warlike operations, the risk of which was assumed by the United States.

CONCLUSION

It is respectfully submitted that the judgment and decision of the Court of Claims is erroneous and should be reversed.

Dated at Seattle, Washington, September 16, 1950.

Respectfully submitted,

EDWARD G. DOBRIN,
STANLEY B. LONG,
Counsel for Petitioner.

BOGLE, BOGLE & GATES,
Of Counsel

In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. ~~710~~ 37

LIBBY, MCNEILL & LIBBY, A CORPORATION,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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OPINION BELOW

The opinion of the Court of Claims (R. 31-42) is reported at 87 F. Supp. 866.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1950 (R. 43). The petition for a writ of certiorari was filed on March 28, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED

Whether the stranding of a vessel, caused solely by incompetent navigation and seamanship, is converted from a marine risk to a war risk for insurance purposes by reason of the fact that the vessel was generally engaged as an army transport in carrying supplies to Alaskan bases.

CONTRACT PROVISIONS INVOLVED

The Free of Capture and Seizure Clause, delineating war risk coverage, provides (R. 18):

> Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

The war risk clause provides (R. 17):

> (b) Charterer shall assume all other risks, including war risk (whether or not there shall be a declaration of war) * * *

STATEMENT

Petitioner is the owner of the *David W. Branch* which was, at the time of the stranding here in-

volved, being operated by the United States, under a bareboat charter with petitioner, as an army transport between Seattle and Alaskan bases (R. 16). The charter party required petitioner to provide marine insurance for the Government's as well as its own account (R. 16-17). In compliance with this requirement, petitioner procured marine insurance for "Owner's and Charterer's account" (R. 17).[1] War risk coverage was assumed by the United States (R. 17). The policy was endorsed "extended also to cover the interest of the United States Government."

The two routes between the Puget Sound area and Alaskan ports, the inside passage and the outside passage, are fully described in the findings of the Court of Claims (R. 18-20). Briefly, the "outside route" involves open sea navigation while the "inside passage" requires a vessel to proceed between the islands off the coasts of Canada and Alaska and the mainland. On two voyages prior to the voyage here involved, the *Branch* followed the outside route except that on the return to Seattle during the second voyage, immediately after the outbreak of war on December 7, 1941, the inside passage was used (R. 21-23). During the second voyage and prior to the third voyage, the trip here involved, the *Branch* was readied for

[1] Coverage was to be "for Owner's and Charterer's account, giving Charterer [the United States] the benefit of such insurance", and the owner and underwriters "shall have no right of recovery or subrogation" against the Government (R. 16-17).

service under war conditions (R. 22-23), including "deperming" which resulted in an unstable magnetic field about the ship and rendered magnetic compasses unreliable (R. 23-24). On the third voyage from Seattle, the *Branch*, pursuant to sailing orders issued by the Port Director for the Thirteenth Naval District, used the inside passage (R. 25-26). On the night of January 13, 1942, the *Branch* had proceeded on the inside passage sufficiently so as to have Herbert Reef abeam on the port side (R. 27). The navigating details surrounding the stranding on Hanmer Island, approximately two miles north of Herbert Reef, are fully described in the findings of the Court of Claims (R. 27-28). Briefly, the master set his course by lining the vessel up with the Genn Island light, a course on which the *Branch* would have passed approximately 350 yards to the west of Hanmer Island, a proper and safe course (R. 28). Shortly thereafter, the pilot noticed that the Genn Island light was blacking out, indicating that Hanmer Island was coming between the ship and the light (R. 28, 34). The pilot thereupon ordered the helmsman to go left but the helmsman swung to the right and the vessel diverged further from the directed course (R. 28). The pilot then shouted "hard left" but the helmsman swung hard right (R. 28). *In extremis*, the second mate jumped to the wheel and put it hard left but the vessel hit the partially submerged reef which is part of Hanmer Island (R. 28).

Petitioner received from the London Marine Underwriters the total sum of $342,170.48, on account of the damage resulting from the stranding, under a loan agreement requiring petitioner to attempt to effect recovery from the Government, the "loan" being repayable to the underwriters out of any such recovery (R. 30). Petitioner received a smaller sum from the Fireman's Fund Insurance Company under a similar arrangement (R. 30-31). This suit was instituted in the Court of Claims for the recovery of the stranding damage and for charter hire, under the war risk coverage assumed by the Government (R. 1-8). The Court of Claims found that the casualty which befell the *Branch* was not the "* * * consequence of a warlike operation," (R. 41), and, accordingly, dismissed petitioner's suit (R. 43).

ARGUMENT

The Government's argument as to this case forms part of its argument in the brief in opposition in the companion case, *Standard Oil Company of New Jersey* v. *United States of America*, Nos. 663 and 664. The Court's attention is respectfully directed to that brief at pp. 6-15. For the reasons there set forth, we submit that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
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SAMUEL D. SLADE,
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Attorneys.

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In the Supreme Court of the United States

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OPINION BELOW

The opinion of the Court of Claims (R. 31-42) is reported at 87 F. Supp. 866.

JURISDICTION

The judgment of the Court of Claims was entered on January 3, 1950 (R. 43). The petition for a writ of certiorari was filed on March 28, 1950, and was granted on June 5, 1950 (R. 44). The

jurisdiction of this Court rests upon 28 U. S. C. 1255(1).

QUESTION PRESENTED

Whether the stranding of a vessel, caused by an incompetent helmsman and his faulty execution of the directions of the pilot, is converted from a marine risk to a war risk, for insurance purposes, by reason of the fact that the vessel was engaged in the warlike operation of carrying military personnel and supplies to Alaskan bases.

CONTRACT PROVISIONS INVOLVED

The policy of marine insurance procured for the vessel here involved contained the following Free of Capture and Seizure Clause, delineating war risk coverage (R. 18):

> Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

The charter party entered into between petitioner and the United States contained the following war risk clause (R. 17):

> Charterer shall assume all other risks, including war risk (whether or not there shall be a declaration of war) * * *

STATEMENT

This case arose as a result of the stranding on January 13, 1942, of the transport *David W. Branch*, owned by petitioner. At the time of the accident the vessel was being operated as an Army Transport by the United States under a bareboat charter (R. 16, 21). While engaged in the warlike operation of transporting military cargo and personnel from the port of Seattle to certain war bases in Alaska, the *Branch* stranded on Hanmer Island, in the "inside passage" (R. 24, 35). The two routes between the Puget Sound area and Alaskan ports, the "inside passage" and the "outside route," are fully described in the findings of the court below (R. 18-20). Briefly, the outside route involves open sea navigation while the inside passage requires a vessel to proceed between the islands off the coasts of Canada and Alaska and the mainland. On two voyages prior to the voyage here involved, the *Branch* followed the outside route except that on the return to Seattle during the second voyage, immediately after the outbreak of war on December 7, 1941, the inside passage was

used (R. 21-23). During the second voyage and prior to the third voyage, the trip here involved, the *Branch* was readied for service under war conditions (R. 22-23), including "deperming" which resulted in an unstable magnetic field about the ship and rendered magnetic compasses unreliable (R. 23-24).

On the third voyage to Alaska, the *Branch* was directed by the Navy Routing Officer at Seattle to proceed by the inside passage, in order to avoid the menace of Japanese submarines on the outside route (R. 25). On the night of January 13, 1942, the *Branch* had proceeded on the inside passage to a position abeam Herbert Reef, some two miles south of Hanmer Island (R. 27). Since the weather was clear, Hanmer Island was visible from the vessel, as was the beacon light on Genn Island, some five miles northwest of Hanmer Island (R. 27). On passing Herbert Reef, the master set his course by lining the vessel up with the Genn Island light, a course on which the *Branch* would have passed approximately 350 yards to the west of Hanmer Island, a proper and safe course (R. 28). The master then went into the chartroom and found there the second mate, who should have been watching the helmsman (R. 28). Because of the wartime manpower shortage the helmsmen on board were inexperienced and for that reason there was a standing order for the mate on watch to

stand alongside the helmsman to watch his steering (R. 28). The master immediately sent the mate back to the pilothouse. Shortly thereafter, the pilot noticed that the Genn Island light was blacking out, indicating that Hammer Island was coming between the ship and the light (R. 28, 34). The pilot thereupon ordered the helmsman to go left but the helmsman swung to the right and the vessel diverged further from the directed course (R. 28). The pilot then shouted "hard left" but the helmsman swung hard-right (R. 28). *In extremis*, the second mate jumped to the wheel and put it hard left but the vessel hit the partially submerged reef which is part of Hammer Island (R. 28).

The unstable steering compass, resulting from the deperming operation, may have been a contributory factor to the vessel's deviation from her course (R. 28). The court pointed out that "the stranding would not have occurred, however, if the helmsman had been competent and had obeyed the directions of the pilot" (R. 28-29).

As remarked above, the vessel was on a bareboat charter to the United States at the time of the accident. The charter party required petitioner to provide marine insurance for the Government's as well as its own account on the usual American Time Hulls form of insurance (R. 16-17). Petitioner complied with this requirement and pro-

cured policies of marine insurance in the usual American Time Hulls form (R. 17). These policies contained the following F. C. & S. clause (*supra*, p. 2):

> * * * This insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from * * * all consequences of hostilities or warlike operations * * *

Section 13 of the charter provided that the United States should assume war risk coverage (R. 17).

The *Branch* suffered severe damage in the stranding, and petitioner made a net expenditure of $345,515.48 in connection with repairs and salvage operations (R. 29). Petitioner received the sums of $342,170.48 and $1,570.27 from the insurance companies which issued the policies of marine insurance, under a loan agreement requiring petitioner to attempt to effect recovery from the Government, the "loan" being repayable to the underwriters out of any such recovery (R. 30-31). This suit was instituted in the Court of Claims for the recovery of the stranding damage and for charter hire in the sum of $60,085.57, under the war risk coverage assumed by the Government (R. 1-8). The Court of Claims was of the opinion that there must be some causal relation between the warlike operation in which the *Branch* was engaged and the stranding, before the stranding could be regarded as a consequence of the warlike operation

(R. 40). The court found no such relation, hence concluded that "the casualty which befell the *Branch* was not a consequence of a warlike operation" (R. 41). Accordingly, it dismissed petitioner's suit (R. 43). A concurring opinion held that the stranding was not a consequence of hostilities or warlike operations since the cause of the loss was the fact that the mate had disobeyed orders and was not standing beside the helmsman when the order was given to turn left (R. 42).

ARGUMENT

The factual pattern presented here is somewhat different from that in the companion case, *Standard Oil Company of New Jersey* v. *United States*, Nos. 27 and 28, but the problem remains the same—that of allocating loss between marine risks and war risks. Just as in that case, the instant case involves the interpretation and application of the words "consequences of hostilities or warlike operations," appearing in an F. C. & S. clause. It presents a similar issue: whether a stranding, caused solely by incompetent navigation and seamanship, is converted from a marine risk to a war risk, a "consequence of hostilities or warlike operations," simply by virtue of the fact that the vessel was engaged in the warlike operation of transporting military supplies and personnel between war bases. The Court of Claims' answer to this question was in the negative. Relying on the well established

principles of proximate causation, it found that the stranding did not result from the mere fact that the *Branch* was engaged in a warlike operation (R. 36, 40), and concluded that the casualty was not "a consequence of a warlike operation" (R. 41). The result, of course, was that the stranding was not a risk excluded by the F. C. & S. clause, hence it was not assumed by the United States as war risk insurer.

It is petitioner's contention that the helmsman's incompetent act of swinging out of, instead of into, the safe channel is immaterial, and that a stranding in the course of the warlike operation of transporting supplies between war bases is necessarily the proximate result of that warlike operation (Br. 18, 21, 23). To support this contention, the identical approach employed by petitioner in the *Standard Oil* case is used. The English decisions are put forward as controlling, pursuant to the alleged "conformity rule" announced by Mr. Justice Holmes in *Queen Ins. Co.* v. *Globe Ins. Co.* (*The Napoli*), 263 U. S. 487 (Br. 24, Pet. 20). For the reasons set forth at pp. 8-37 of our brief in the *Standard Oil* case, we submit that the decision below is correct and reflects the views of this Court, and that the position taken by petitioner is erroneous.

We think the views expressed in our brief in Nos. 27 and 28 fully illustrate the error of the position taken by petitioner here. It might be pointed

out, moreover, that none of the English decisions relied upon by petitioner are direct authority for the result for which petitioner contends. Closest in point is *The Coxwold,* [1942] A. C. 691, where it was held that the stranding of a vessel, caused by a maneuver to avoid an enemy submarine while the vessel was engaged on a war mission, was a war risk. Admittedly, certain of the judges went on to announce the so-called "umbrella" theory, and made the rather sweeping observation that a stranding in the course of a warlike operation was automatically a war risk, whether negligently conducted or not. These observations were expressions of opinion, however, and were not essential to the decision in the case. Opposed to them are other dicta which make a distinction between negligence resulting from acts of omission as distinguished from acts of commission, and which suggest that a collision or stranding, caused by a negligent act of commission in the course of a warlike operation, would not be considered a consequence of hostilities or warlike operations. See, *e.g., The Warilda* [1923] A. C. 292, 302; *Inui Gomei Kaisha* v. *Attolico,* Lloyd's List, July 20, 1918; Lloyd's List, February 10, 1919. We think it very doubtful, therefore, that the House of Lords would find a stranding such as is involved here—a stranding caused by the inexcusable error of the helmsman in turning the wheel the wrong way—to be a consequence of hostilities or warlike operations.

CONCLUSION

For these reasons, and those set forth in our brief in Nos. 27 and 28, it is respectfully submitted that the judgment of the Court of Claims be affirmed.

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OCTOBER 1950.

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No. 37

Supreme Court of the United States

OCTOBER TERM, 1950

LIBBY, MCNEILL & LIBBY, a Corporation,
Petitioner,

— VS. —

THE UNITED STATES OF AMERICA

PETITIONER'S PETITION FOR REHEARING

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No. 37

PETITIONER'S PETITION FOR REHEARING

INTRODUCTION

Petitioner respectfully petitions for a rehearing on the ground that the majority opinion, affirming the judgment of the Court of Claims, is based upon certain specific statements of fact which are without foundation in, and are contrary to, the record before this Court.

The Court's opinion in this matter was delivered on November 27, 1950. The majority opinion consists of a single paragraph, the pertinent portions of which are as follows:

> "* * * the Government insured petitioner's ship against war risks including 'all consequences of hostilities or warlike operations.' * * * The Government admits that the BRANCH was engaged in the warlike operation of transporting military supplies and personnel between war bases, but denies that the warlike phases of the operation caused the stranding. *The Court of Claims found as a fact that there was no causal*

> *connection between the 'warlike operation' and the stranding * * *. There was evidence to support this finding.* Petitioner's contentions for reversal here are substantially the same as those advanced in *Standard Oil of New Jersey v. United States, supra.* The reasons given for our holding there require affirmance in this case." (Italics supplied)

In the companion case referred to, the Court stated that it was "asked only to determine whether as a matter of law the provision insuring against 'all consequences of * * * warlike operations' covered the loss" (*Standard Oil Co. of New Jersey v. United States*, Nos. 27 and 28, Slip Opinion, p. 3). The majority of this court then held that the question presented could not be determined as a matter of law, but depended "on the resolution of factual questions" (Slip Opinion, p. 5).

In the instant case, the Court therefore considered the issue as being a factual one, and the majority then based their conclusion entirely upon the two sentences which we have italicized in the above quotation, wherein the majority made the following two statements:

1. "The Court of Claims found as a fact that there was no causal connection between the 'warlike operation' and the stranding * * *"; and

2. "There was evidence to support this finding."

Petitioner respectfully submits that *neither of those statements has any support in the record.* Petitioner submits that:

(1) The Court of Claims did NOT make any such finding of fact; and

(2) The evidence in this case was not included in the record brought up from the Court of Claims, hence there is a complete absence of any basis in the record for the statement in the majority opinion as to the evidence in the case.

DISCUSSION

1. The Court of Claims made no specific finding of fact on the matter of causal connection between the warlike operation and the stranding.

The court's attention is respectfully directed to the Special Findings of Fact made by the Court of Claims (R. 15-31; 87 F. Supp. 866-875). The court will find no specific reference therein to the fact of "causal connection between the 'warlike operation' and the stranding * * *."

No further comment on this point should be required, since the record will speak for itself.

Possibly the majority relied upon language in the *Opinion* (as distinguished from the Findings of Fact), of the Court of Claims as the basis for their statement that such a finding of fact was made by the Court of Claims. If that be true, the Court's attention is invited to the principle that has been firmly established by a long line of decisions of this Court that the *Opinion* of the Court of Claims may not be referred to "for additional findings, or to eke out, control or modify the scope of the findings."

Robertson & Kirkham, *Jurisdiction of the*

Supreme Court of the United States, §212, pp. 362-3;

U.S. v. Causby (1946) 328 U.S. 256;

M. E. Blatt Co. v. U.S. (1938) 305 U.S. 267;

U.S. v. Seminole Nation (1937) 299 U.S 417;

U.S. v. Esnault-Pelterie (1936) 299 U.S. 201;

U.S. v. Wells (1931) 283 U.S. 102;

Brothers v. U.S. (1919) 250 U.S. 88;

Crocker v. U.S. (1916) 240 U.S. 74;

Stone v. U.S. (1896) 164 U.S. 380;

Saltonstall v. Birtwell (1893) 150 U.S. 417;

British Queen Mining Co. v. Baker Silver Mining Co. (1891) 139 U.S. 222.

2. The evidence in the case was not before the court.

The second basis for the opinion of the majority was the statement that "there was evidence to support" the alleged finding by the Court of Claims.

On that point, it should be sufficient to point out simply that the record in this case did not include the evidence. The reason for that, from Petitioner's standpoint, is that *there is nothing adverse to Petitioner's position in the findings of fact that were made.* There is no such finding of fact as that to which the majority made erroneous reference, and, as is pointed out in Justice Frankfurter's dissenting opinion, the only reasonable inference from the findings

of fact that *were* made are entirely in Petitioner's favor.

Regardless of the reasons therefor, however, the fact remains that the evidence in this case was not before this court, and there is therefore no basis whatsoever in the record for the statement in the majority opinion that "there was evidence to support" the alleged finding.

CONCLUSION

It is therefore submitted that the specific factual grounds upon which the court directed affirmance of the judgment of the Court of Claims are without foundation in the record before this Court.

As is pointed out in the dissenting opinion of Mr. Justice Frankfurter, the facts that were found by the Court of Claims actually require the conclusion that the necessary causal connection *was* present. The only basis in the majority opinion for an opposite conclusion is the erroneous statement that the Court of Claims had made a finding of fact to the contrary.

We therefore submit that the Findings of Fact that were entered by the Court of Claims establish that the necessary causal connection between the "warlike operations" and the stranding did exist, and that the judgment of the Court of Claims should therefore be reversed. That result will be entirely consistent with the decision in the companion *Standard Oil Company* case.

In the alternative, should the Court be of the opinion that the Findings of Fact as made by the Court

of Claims do not establish the existence of that causal connection, the case should be remanded to the Court of Claims for the making of appropriate additional findings.

In no event can *affirmance* of the judgment of the Court of Claims be justified on the present state of the record.

Respectfully submitted,

EDWARD G. DOBRIN,

STANLEY B. LONG,

Counsel for Petitioner,
603 Central Building,
Seattle 4, Washington.

BOGLE, BOGLE & GATES,
Of Counsel.

CERTIFICATE

The foregoing Petition for Rehearing is believed to be meritorious and is presented in good faith and not for delay.

Dated at Seattle, Washington, this 7th day of December, 1950.

EDWARD G. DOBRIN,

STANLEY B. LONG.